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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD SALVESEN AND SIR DINSHAH MULLA.

Bechu Singh and another .. *Appellants**

v.

Kumar Kamakhya Narain Singh .. *Respondent.*

P. C. — Bechu Singh *v.* Kumar Kamakhya Narain Singh.

Landlord and tenant—Possession of village commenced as thikadars [illegible] *t acquisition of right of occupancy* [illegible]

[illegible] tion of a village commenced under a putta [illegible] for the purpose of collecting rents and [illegible] n by establishing tenants on it, [illegible] ere mere thikadars and tenure-holders and [illegible] their occupation as such, acquire a right of [illegible] the village.

[illegible] 1930 from a decree of the High Court, [illegible] th December, 1928, which had reversed a [illegible] udicial Commissioner of Chota Nagpur, dated [illegible], 1926, which in turn had varied a decree of the [illegible] e Judge of Hazaribagh, dated the 14th April, 1924. [illegible] e question on the present appeal was whether the defend[illegible] nts-appellants had a raiyati interest of a permanent occupancy character in respect of the lands in their own cultivation in the village in suit. The first Appellate Court answered the question in the affirmative, but the Trial Judge and the High Court took the contrary view.

De Gruyther, K.C. and *Dube, K.C.* for appellants.—The appellants are cultivating raiyats (khudkasht) and not mere thikadars or tenure-holders: *Dhakeshwar Prasad Narain Singh* v. *Gulab Kuer,*

*P. C. Appeal No. 92 of 1930. Patna Appeal No. 5 of 1929. 29th February, 1932.

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(1926) L.R. 53 I.A. 176: 31 C.W.N. 341 (P.C.), where the expressions "khudkasht" and "bakasht" are explained in the judgment of Mr. Ameer Ali.

On its true construction, the putta by which the appellants came into possession was a cultivating lease, and the appellants acquired occupancy rights. In the Record of Rights they were shown as non-resumable thikadars.

[LORD RUSSELL observed that the entries in the settlement records did not help the appellants.]

Dunne, K.C. (with *Wallach*) for respondent.—In the Record of Rights the appellants are entered as ***bemiadi*** thikadars. When the inception of the tenancy was a mere thikadari, there could be no accrual of raiyati right by lapse of time: ***Midnapur Zamindary*** *Co.* v. *Naresh Narayan Roy,* (1924) L.R. 51 I.A. 293: I.L.R. 51 Cal. 631: 47 M.L.J. 23 (P.C.).

[LORD RUSSELL doubted whether a person entering as a thikadar could himself subsequently set up a title as occupancy raiyat.]

The decisions of the Board are to the effect that he cannot.

De Gruyther, K.C., in reply.—The High Court in second appeal was not competent to set aside the finding of the first Appellate Court that the defendants had raiyati rights in the lands: Section 100, Civil Procedure Code.

29th February, 1932. Their Lordships' judgment w[illegible] delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This [illegible] ment and decree, dated the 4th D[illegible] Court at Patna, which reversed a[illegible] 1926, of the Judicial Commission[illegible] restored a decree, dated the 14th Apr[illegible] nate Judge of Hazaribagh.

The sole question for determinatio[illegible] whether the defendants-appellants are raiya[illegible] of occupancy within the meaning of the C[illegible] Tenancy Act, 1908, in a village forming part of th[illegible] estate situated in Hazaribagh.

The suit out of which this appeal arises was instituted [illegible] the plaintiff-respondent, who is the proprietor of the estate, against the defendants in March, 1923, to recover possession of the village. The village contains about 212 acres. The ground of the plaintiff's claim was that the defendants were tenants from year to year and they were liable to be ejected after due notice and that such notice was given.

The defendants by their written statement pleaded that the land was first reclaimed from jungle and brought into cultiva-

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tion by the ancestors of Ramnath Singh, the maternal grandfather of defendant No. 1, and that it descended in due course to Ramnath Singh. They alleged that Ramnath Singh was assisted in the cultivation and management of the village by Deodutt Singh, the father of defendant No. 1, and that on the death of Ramnath Singh defendant No. 1 succeeded to the village as his heir under the Hindu Law They further alleged that after the death of Ramnath Singh, Deodutt Singh supervised the cultivation of the village on behalf of defendant No. 1, who was then a minor, and they claimed that they and their predecessors-in-title had held the land as raiyats and acquired a right of occupancy therein. Defendant No. 2 is the son of defendant No. 1.

Particulars of the land claimed by the defendants are given in five schedules annexed to the written statement. Schedule A comprises about 68·81 acres of land which was under their own cultivation. Schedule B contains land which was in the possession of under-tenants. The rest of the land is described in Schedules C, D and E.

The earliest document on the record is a putta dated the 21st February, 1857, granted by Munshi Roshan Lal who then held the village as a jaghir from the then zemindar. By this putta the village was given in "thika ijara" to Ramnath Singh for a term of ten years "with the details that in 1914 Sambat [1857 A.D.] he will have 25 bighas land and 9 mahua trees at an annual rental of Rs. 12-8-0 in Company's coin, and from 1915 to 1923 Sambat [1858-1866 A D.] he will have the entire mauza including *uthati* (culturable) and fallow lands within the boundaries of the said mauza at an annual rental of Rs. 106-4-0 in Company's coin." The putta also provided that Ramnath Singh "should cultivate (or people) the village, keep the tenants satisfied, inhabit and settle tenants therein," and that after the expiry of the lease "the mauza will be temporarily settled with none else than Chaudhuri Ram Nath Singh on properly enhanced rent, and if the money is not paid the said Munshi will be at liberty to do what he likes."

In 1877 the predecessor-in-title of the plaintiff granted the mauza and other villages to his youngest brother Hit Narain Singh as a jaghir for his maintenance. In 1879 Hit Narain Singh gave a thika lease of the mauza to Ramnath

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Singh and Deodutt Singh for a term of five years at an annual rent of Rs. 105-4-0, being the same as that reserved under the putta of 1857. The essees having failed to pay the rent, a suit was brought by Hit Narain Singh in 1883 in the Revenue Court for arrears of rent, and he obtained a decree against them. In that suit Ramnath Singh contended that he held the land as a raiyat at a fixed rent of Rs. 75 per annum, but this was found against him.

The thika lease was renewed for a further period of five years, and on the 3rd September, 1884, a kabuliyat was executed by Ramnath Singh and Deodutt Singh in favour of Hit Narain Singh whereby they agreed to give up possession of the village on the expiry of the lease and to "keep the village populated or cultivated (*abad*), and keep the tenants satisfied." This phraseology is very similar to that used in the putta of 1857. The lease was again renewed in 1889, and it expired in 1894.

In 1895 Hit Narain Singh granted a thika lease of the village to Lut Baran Singh. On the 19th July, 1895, Lut Baran Singh granted a sub-lease to Deodutt Singh for a period of five years, and a kabuliyat was executed by Deodutt Singh whereby he undertook among other things to "keep the village populated (or cultivated *abad*) and keep the tenants contented."

In 1902 Lut Baran Singh filed a road-cess return in respect of this mauza. This document is not printed in the record prepared for this Board, but it appears from the judgment of the Judicial Commissioner that Deodutt Singh and his son, defendant No. 1, were described in that document as raiyats, the former holding 90 bighas, that is, 30 acres, at an annual rent of Rs 140, and the latter holding 24 bighas, that is, 8 acres, at an annual rent of Rs. 41. The defendants relied upon this return and upon three receipts passed by Lut Baran Singh to Deodutt Singh, one for the rent for 1902, another for the rent for 1904, and the third for the rent for 1905. In these receipts the total annual rent payable by Deodutt Singh is stated to be Rs. 194-9-6, of which Rs. 75 is shown as the rent of "raiyati land including cesses," and Rs. 119-9-6 as rent "on account of lac and mahudam".

Lut Baran Singh's lease expired in 1905. On the 27th January, 1908, Deodutt Singh applied to Hit Narain Singh for

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a grant of a thika lease to him, but no lease was executed. Hit Narain Singh died in 1913 without leaving male issue, and the jaghir was resumed by the plaintiff in the same year.

This was followed by proceedings for the preparation of the record of rights which was finally published in 1915. In the Khewat the defendants' right in this mauza is described as *thika bemeyadi* and as non-resumable. The entry in the Khatian is not printed in the record of proceedings, but the contents of the entry appear from the following passage in the judgment of the Judicial Commissioner:—

"The entry which was prepared at the earlier stage in the preparation of the record of rights showed 68 81 acres as the *raiyati* holding of Deodutta. All this area is entered as *bakasht* in the finally published Khatian of the village. . . Schedule A [to the written statement] contains the lands in his own cultivation 68·81 acres in accordance with the Khatian, Ex 17, which shows this area as in the cultivation of Deodutta"

The correctness of the Khewat entry was disputed both by the plaintiff and the defendants. The defendants maintained that the holding was raiyati and not thika. The plaintiff contended that the tenancy was resumable, and not non-resumable

The Subordinate Judge found that the defendants had [illegible] was reclaimed from jungle by the [illegible] or that they were the original [illegible] held that the defendants were [illegible] reed the plaintiff's claim

[illegible] the defendants appealed to the Judicial [illegible] Chota Nagpur At the hearing of the appeal [illegible] gave up their claim in respect of lands com- [illegible] Schedule B. The Judicial Commissioner affirmed [illegible] finding of the Subordinate Judge that the village was not founded by the ancestors of Ramnath Singh, but held that the putta of 1857 was given to Ramnath Singh to cultivate a specific area of 25 bighas as a raiyat in the first year and to continue to cultivate that area in subsequent years as well as to collect rents from the raiyats in the subsequent years. He considered that the 25 bighas constituted the nucleus which by the gradual growth of the cultivated area increased to 38 acres in 1902 when the road-cess return was filed, and increased further by similar process to 68·81 in 1914 when the Khatian was prepared. He concluded that the defendants had acquired a right of occupancy in the land comprised in

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Schedules A, C, D and E, and allowed the appeal to that extent.

The plaintiff appealed from that decree to the High Court at Patna. The High Court differed from the Judicial Commissioner and held that the putta of 1857 was an ordinary thika lease for the whole village and that the defendants were mere tenure-holders. They accordingly reversed the decree of the Judicial Commissioner and restored that of the Subordinate Judge. It is from that decree that the present appeal has been brought by the defendants to His Majesty in Council.

Two contentions were raised before their Lordships on behalf of the defendants. First, it was urged that the putta of 1857 was in part for the cultivation by Ramnath Singh of the specific area of 25 bighas which was until then unreclaimed, that raiyati rights accrued under that putta to Ramnath Singh, and that the road-cess return of 1902 and the three receipts passed by Lut Baran Singh to Deodutt Singh were evidence of past acquisition of those rights. Next, it was argued that even if no right of occupancy had accrued before 1900, being the year in which the last of the thika leases expired, the defendants having been in occupation of the lan[illegible] from 1900 to 1923, they must be [illegible] a raiyati status during that period [illegible]

Their Lordships are unable [illegible] of 1857 any cultivating tenancy in [illegible] other area. They think that the putta w[illegible] entire village for the purpose of collecting [illegible] it under cultivation by establishing tenants on [illegible] fact that only 25 bighas were let for the first ye[illegible] tenancy of the whole village was not to commence un[illegible] next year raises no presumption that that parcel was singled out for the purpose of cultivation by Ramnath Singh as a raiyat. The reasons for limiting the letting area to 25 bighas during the first year of the tenancy could at best be a matter for speculation. In other respects the putta is in terms very similar to the kabuliyats of 1884 and 1895 both of which were admitted to be leases for the purpose solely of collecting rents. Their Lordships are of opinion that no right of occupancy could be founded upon the putta of 1857.

The putta of 1857 expired in 1866, and it was followed in 1879 by a thika lease of the whole village for a term of

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five years. The rent payable under that lease was Rs. 106-4-0, being the same as that reserved under the putta of 1857. This fact almost goes to show, if no other lease was granted to Ramnath Singh between 1867 and 1879, that he held over after 1866 under the putta of 1857. Then came a series of thika leases and sub-leases for a period each of five years from 1884 up to 1900. Being thikadars of the whole village until 1900, the predecessors of the defendants could not acquire any right of occupancy in any part of the village during that period. The entry, therefore, in the road-cess return of 1902 describing Deodutt Singh and defendant No. 1 as raiyats and the receipt for the rent for the same year passed by Lut Baran Singh to Deodutt Singh describing the land as raiyati could not be correct. The subsequent receipts for the rent for 1904 and 1905 are substantially in the same terms as that for the rent for 1902, and they do not advance the defendants' case. Moreover, all the three receipts have been found by the Judicial Commissioner to be "collusive," at least as regards the amount of rent mentioned therein, which is quite different from that in the road-cess return. No weight, in their Lordships' view, could be attached to these receipts. Nor is there [illegible] of raiyati rights at any subsequent [illegible] lease expired in 1905. In January, [illegible] to Hit Narain Singh for a grant [illegible] village which again was to be a [illegible] ase, however, was executed, but it [illegible] eedings before the Attestation Officer [illegible] was in possession of the whole village [illegible] ough it does not appear from what date. [illegible] from the judgment of the High Court, [illegible] d a decree against Deodutt Singh for [illegible] and this was followed by a notice to quit. [illegible] facts, in their Lordships' opinion, do not establish that the defendants acquired any raiyati rights even after the expiry of the putta of 1857.

Their Lordships are, therefore, of opinion that this appeal fails, and it should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins and Hunter.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

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[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT :—LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

Abdul Halim Khan .. *Appellant**

v.

Raja Saadat Ali Khan and others .. *Respondents.*

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Abdul Halim Khan *v.* Raja Saadat Ali Khan.

Oudh Estates Act (I of 1869), S. 29—"Widow"; effect of re-marriage on power to adopt—Marriage with two sisters invalid by Muhammadan Law

Where the widow of a Muhammadan Taluqdar was authorized by his Will to adopt a son, and it was provided that in the event of her contracting a second marriage " she shall not be entitled to avail herself of any of the provisions of this Will ",

Held, that both upon the construction of the Will and under the express terms of S. 29 of the Oudh Estates Act (I of 1869) the widow of a Muhammadan Taluqdar has no power to adopt a son to her deceased husband after her re-marriage.

It is contrary to the Muhammadan Law for a man to be the husband of two sisters at the same time[1].

Judgment of the Appellate Bench of the Chief Court of Oudh affirmed.

Appeal No. 60 of 1931, by special leave, from a judgment and decree, dated the 2nd April, 1928, of the Chief Court of Oudh, which affirmed a judgment and decree of the same Court, dated the 16th September, 192[illegible] diction. The judgment of the T[illegible] Appellate Bench are reported in [illegible] (1928) 112 I. C. 596 respectively[illegible]

The plaintiff-appellant, a Shiah [illegible] Nanpara Estate as the adopted son of [illegible] Mohomed Siddiq Khan, who died on the [illegible] without any issue and leaving him survivi[illegible] his Will the late Raja gave to each of his [illegible] power to adopt a son to him, and it was de[illegible] the wives re-married after the death of the [illegible] her rights and privileges under the Will. Rani Cha[illegible] widow, re-married one Sher Mohomed Khan in March, [illegible] thereafter she adopted the plaintiff-appellant on the 25th July, 1914. The sole question for determination on the present appeal was whether, having regard to the terms of the Will and of section 29 of the Oudh Estates Act (I of 1869), the plaintiff's adoption was invalid on the ground that it was made by Rani Champa subse-

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*P. C Appeal No. 60 of 1931. Oudh Appeal No 16 of 1928. 10th March, 1932.

1. These words " at the same time ", though not in the judgment, are obviously implied: *see* Wilson's Muhammadan Law, 3rd ed., para. 38, p. 115.—K. J. R.

quently to her re-marriage. Both the Courts in India having held that the adoption was invalid, the plaintiff preferred this appeal to the Privy Council by special leave.

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Dube, K.C, for appellant.

Dunne, K.C., M. A. Jinnah and *S Hyam* for respondents.

10th March, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

Sir George Lowndes.—The appellant in this case is the claimant to a large and valuable talukdari estate in Oudh, known as Taluqa Nanpara, the succession to which is governed by Act I of 1869[1]. The 1st respondent was at the date of the suit in possession of the estate, and unless the appellant is able to show a better title in himself, it is admitted that he cannot succeed.

The last full owner was Raja Muhammad Siddiq Khan, who died without issue on the 30th December, 1907. He left four widows him surviving, and by his will gave successive authorities to each of them to adopt a son. The 1st respondent is in as the adopted son of the second widow, Rani Saltanat. The appellant claims to oust him as the adopted son of the fourth widow, Rani Champa, on the ground that his [illegible] was the only valid one. The other [illegible] on of parts of the estate under a [illegible] pondent.

[illegible] e suit was whether the adoption of [illegible] of which is admitted, was valid, and [illegible] nce was that Rani Champa had been re- [illegible] Sher Mahomed Khan before the adoption of [illegible], and that for this reason his adoption was invalid. [illegible] question of the re-marriage was contested at great [illegible] gth in the Oudh Court, as is testified by the bulky record now before the Board. The appellant, in addition to denying the re-marriage in fact, asserted that, previous to the date on which it was alleged to have taken place, Sher Mahomed Khan had been married to the sister of Rani Champa, and this was put forward as making the story of the latter's re-marriage impossible, it being admittedly contrary to the Mahomedan law for a man to be the husband of two sisters.

The Trial Judge and the Court of Appeal have concurrently held that the re-marriage of Rani Champa with Sher

1 Oudh Estates Act (I of 1869).—K. J. R

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Mahomed Khan, on a date prior to the adoption of the appellant, is established by the evidence. They are also agreed that the alleged previous marriage with the Rani's sister, the burden of proving which was clearly upon the appellant, is not established. These findings must, in accordance with the recognized practice of the Board, be held conclusive as to the fact of the re-marriage.

It only remains to consider an alternative contention of the appellant that the re-marriage did not invalidate the adoption. This again has been negatived by both the Indian Courts, mainly on the strength of clause 10 of Raja Muhammad Siddiq Khan's will. The official translation of this clause, which was before the Trial Judge, was in the following terms :—

> "If any of the Ranis contract a second marriage after me she shall not be entitled to be profited by any of the paras. of this will."

The learned Judge held that the power of adoption was on the same footing as a power of appointment and therefore "a benefit or privilege" conferred on the widow which she would, under the terms of this clause, forfeit upon re-marriage. He also thought that under section 29 of the Oudh Estates Act (I of 1869), by whi[illegible] adoption is given to the widow o[illegible] the power could only be exercised [illegible] widow at the time of making the a[illegible]

In the Court of Appeal the transla[illegible] will was amended by the learned Judges, [illegible] come up to the Board under the official seal o[illegible] amended translation runs as follows :—

> "If any of the Ranis contract a second marriage after me sh[illegible] be entitled to avail herself of any of the provisions of this will."[2]

The learned Judges thought that on this reading of the clause it was clear that Rani Champa "on her re-marriage with Sher Mahomed Khan forfeited her power of adoption, and consequently the plaintiff's adoption made by her on the 25th July, 1914, is invalid."

Their Lordships, while not disagreeing with the reasoning of either of the Indian Courts on this question, think that the same result is to be arrived at in another way.

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2. The relevant words in the vernacular (Urdu) are: "kisi dafa wasiatnama haza se faeda uthane ke mustahaq na hogi".—K. J. R.

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The parties being Muhammadans, there is no power to adopt under their personal law, and it is only conferred by section 29 of the Act, and must be confined strictly within the limits there laid down. The section is as follows :—

> " Every Muhammadan taluqdar, grantee, heir or legatee, and every widow of a Muhammadan taluqdar or grantee, heir or legatee, with the consent in writing of her deceased husband, shall, for the purposes of this Act, have power to adopt a son whenever, if he or she were a Hindu, he or she might adopt a son."

The power is thus exercisable by the widow of the taluqdar only under such circumstances that if she were a Hindu she would be entitled to adopt. It can, their Lordships think, hardly be doubted that a Hindu widow could not, after re-marriage, make a valid adoption to her former husband. Indeed, this is conceded by Mr. Dube, who has presented the appellant's case with ability and restraint. Their Lordships think that it necessarily follows that the widow of a Muhammadan taluqdar has, under the terms of the section, no power to adopt a son after her re-marriage, and that therefore the adoption of the appellant was invalid and conferred upon him no right to the Nanpara Estate.

For these reasons their Lordships think that this appeal fails and that the appellant's suit was rightly dismissed by the Trial Judge, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents : *Barrow, Rogers and Nevill.*

K. J. R. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

F. B.

The Commissioner of Income-tax, Madras *v.* The Minsararasam Co., Ltd., Salem.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Minsararasam Co., Ltd., Salem .. *Respondent (Assessee).*

Income-tax Act (XI of 1922), S. 10 (2) (ix)—Purchase by company of right to sell patent medicine—Royalty paid to vendor according to agreement—Deduction from profits of company—Permissibility.

*O. P. No. 141 of 1930. 16th December, 1931.

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The Commissioner of Income-tax, Madras v. The Minsararasam Co., Ltd., Salem.

Where a company purchased the right to manufacture and sell a patent medicine and agreed to pay the vendor a sum of Rs. 81,000 and a royalty of 8 annas per bottle of the medicine sold after five years and according to the agreement a sum of Rs. 13,000 odd became payable to the vendor during the year of account, which the company claimed to deduct in computing their income as incurred solely for earning the profits of the business,

Held, that, on a construction of the agreement, the payment of royalty was a part of the consideration for the purchase and, being in the nature of capital expenditure, was not lawfully deductible under S. 10 (2) (*ix*) of the Income-tax Act.

Case stated by the Commissioner of Income-tax, Madras, for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act (XI of 1922).

The petitioners (hereinafter called the company) are a limited company registered under the Indian Companies Act, 1913. They carry on business in the manufacture and sale of Minsararasam, a patent medicine, at Salem, within the jurisdiction of the Income-tax Officer, Salem.

Under an agreement to sell, dated the 29th March, 1923, entered into between the three promoters of the company and the discoverer of the patent medicine, whom I will call *X*, it was covenanted that *X* should sell his right to manufacture, sell and deal generally in Minsararasam to a company to be formed for the purpose of exploiting the said right. The consideration for the sale was:

(1) the payment of a sum of Rs. 81,000 to be paid in five equal yearly instalments of Rs. 16,000 each (Rs. 1,000 to be paid in advance), and

(2) the payment of a royalty of 8 annas per bottle of Minsararasam sold during the existence of the company after the expiry of the fifth year. A copy of the agreement is filed, marked Ex. A.

The total amount of royalty that fell to be paid to *X* during the year of account, 1928-29, under clause (2) of this agreement was Rs. 13,142. The company claim that this sum, *viz*., Rs. 13,142, should be deducted under clause (*ix*) of sub-section (2) of S. 10 of the Income-tax Act in computing their income, profits and gains for the assessment of the year, 1929-30, as expenditure incurred solely for the purpose of earning such profits or gains. The grounds put forward appear to be two, *viz*., (*i*) that the expenditure was not capital expenditure; and (*ii*) that the sum in question has been taxed as income in the hands of the recipient *X*. The company require me to refer the following question for the decision of the High Court:—

"Whether the payment of royalty to *X* in accordance with clause (2) of the agreement, dated the 29th day of March, 1923, is not lawfully deductible under S. 10 (2) (*ix*) of the Income-tax Act, 1922."

It appears to me that the payment of the royalty of 8 annas per bottle of Minsararasam sold is part of the consideration paid

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to *X* for the transfer to the company of his right to manufacture, sell and deal generally in the said medicine. It is therefore money spent to acquire a business in order to earn profits and not money spent for the carrying on of the business. I consider, therefore. that it is an item of capital expenditure.

As regards the second ground I consider that the fact that the amount has been taxed as income in the hands of *X* has no bearing on the question whether the amount should be treated as revenue expenditure in assessing the company.

I therefore request your Lordships to answer the question in the negative.

S. Duraiswami Aiyar and *R. Natesan* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

Beasley, C. J.

JUDGMENTS: *The Chief Justice.*—The petitioners here, a limited company registered under the Indian Companies Act, carrying on business in the manufacture and sale of the "Minsararasam," a patent medicine, claimed a deduction from their income in the year of account of a sum of Rs. 13,000 odd as a lawfully deductible item. They claimed to deduct that sum under S. 10 (2) (ix) of the Indian Income-tax Act as being expenditure incurred solely for the purpose of earning profits or gains. It appears that one Dr. Varadarajulu Naidu had invented this patent medicine or at any rate was the owner of its secret; and on the 29th March, 1923, the petitioners entered into an agreement with Dr. Varadarajulu Naidu for the purchase by them and for the sale by him of all rights and privileges of manufacturing, selling and generally dealing in Minsararasam and covenanted that, if they successfully promoted the company, Dr. Varadarajulu Naidu should sell to them all such rights and privileges for manufacturing, selling and generally dealing in the medicine subject to the following conditions—it is necessary to set out only two of them:

(1) "That the parties of the first part pay to the party on the second part the sum of Rs. 81,000 in five yearly instalments at not less than Rs. 16,000 a year with effect from 1st April, 1923, and (2) that after the expiry of five years a royalty of annas eight on every bottle of Minsararasam sold be paid to the party on the second part as long as the said Minsararasam Company, Ltd , is in existence."

With regard to the former clause, it is stated that the Rs. 81,000 have been paid by the company to Dr. Varadarajulu Naidu and with regard to the second clause, that he

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was paid in the year of account Rs. 13,000 odd representing eight annas on every bottle of the medicine sold by the company. In the Memorandum of Association of the company one of the objects of the company is

"to buy the Minsararasam Company, Salem, its goodwill, rights and privileges from Dr. Varadarajulu Naidu, Salem, for Rs. 81,000 and thus become the sole proprietors to manufacture, sell and generally deal in Minsararasam."

It is contended on behalf of the petitioners that this payment of Rs. 13,000 odd to Dr. Varadarajulu Naidu in pursuance of clause (2) of the agreement of the 29th March was a payment made by them solely for the purpose of earning the profits or gains of the business which in the year of account amounted to Rs. 28,000. The question referred to us depends entirely upon how the agreement before mentioned is construed. It is the petitioners' contention that clause (2) does not relate to the consideration for the purchase of the rights and privileges of manufacturing, selling and generally dealing in the medicine but that the purchase price is that set out in clause (1), namely, Rs. 81,000. It seems quite clear to me that clauses (1) and (2) must be taken together as between them providing the consideration for the purchase of this medicine. If that is so, then this clearly is, as the Commissioner of Income-tax points out in his reference to us, taxable as capital expenditure. It was the amount of money expended for the purchase by the company of this medicine and as such would be assessable and not a lawful deduction under S. 10 (2) (*ix*) of the Indian Income-tax Act. It is further contended that clause (2) of the agreement cannot be said to be consideration for the purchase of the medicine because it provides for something indefinite. It is quite true that it does provide for something indefinite to some extent. At the time of the agreement it could not be known what quantity of medicine would be sold and what amount would be realised by that sale. But as soon as the company started selling the medicine what was indefinite at the time of the agreement became definite and ascertainable at any time and the accounts of the company would show the amount due to the Doctor under clause (2) of the agreement. Therefore, that contention must fail.

The answer to the reference must, therefore, be that the payment of the royalty in accordance with clause (2) of the

agreement is not of a sum lawfully deductible under S. 10 (2) (*ix*) of the Indian Income-tax Act. Costs of the Commissioner Rs. 250.

Ramesam, J.—I agree.

Cornish, J.—I agree.

S. R. *Reference answered in the negative.*

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The Commissioner of Income-tax, Madras *v.* The Minsararasam Co., Ltd., Salem.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

The Commissioner of Income-tax, Madras .. *Petitioner** *(Referring Officer)*

v.

Messrs. Best & Co., Ltd., Madras .. *Respondents* *(Assessees).*

F. B.

The Commissioner of Income-tax, Madras *v.* Messrs. Best & Co., Ltd., Madras.

Income-tax Act (XI of 1922), S. 26 (2)—"Any business"—Meaning of —Several distinct businesses carried on by old company—Transfer of one —New company if a "successor".

The words "any business" in S. 26 (2) of the Income-tax Act do not mean each and every business but any distinct and separate business.

Where a company owning several distinct businesses transferred one of such businesses to a new company, the latter should be treated as having succeeded to the old company in respect of that business within the meaning of S. 26 (2) of the Act. It is not necessary for the applicability of that section that the new company should have taken over all the several businesses of the old company.

Case stated by the Commissioner of Income-tax, Madras, for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act (XI of 1922).

The petitioners (hereinafter referred to also as "the old company") are a private limited company registered under the Indian Companies Act, having its registered office in Madras within the jurisdiction of the Income-tax Officer, First Circle, Madras. According to clause (*c*) of the Memorandum of Association of the company their objects are "to carry on in India and elsewhere the *businesses* of East India merchants, dealers in East Indian produce, manufacturers, general merchants, financiers, financial and general agents, contractors, planters, farmers, store-keepers, wharfingers, mill-owners, ship-owners, barge owners, lightermen, warehousemen, carriers, forwarding and commission agents, brokers,

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*O. P. No. 78 of 1930. 6th January, 1932.

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underwriters, importers and exporters, and any other *trades* or *businesses* which may seem to the company capable of being conveniently carried on in connection with any of the abovementioned *businesses* or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights." The objects are set out at greater length in the succeeding clauses of the Memorandum of Association. The petitioners' activities include trade in skins and hides, tanning, cotton, candles, shipping and stevedoring, clearing and forwarding, engineering, exports and imports and acting as commission agents.

The petitioners in addition to the business carried on in their own name are the proprietors of the concerns known as The Northern Circars Development Company, The Cochin Electric Scheme, The Cocotine Factory and The St. Elizabeth Iron Works.

For the assessment of the year 1928-29 the petitioners fell to be assessed on their income for their year of account ended 30th September, 1927. The Income-tax Officer computed such income to be Rs. 2,52,918. In arriving at this figure he declined to allow a deduction of the following two items:—

(1) A sum of Rs. 1,33,389 representing the loss sustained by the petitioners during the half-year ended 31st December. 1926, in the working of a business called the Eagle Rolling Mills which they owned up to that date at Kumardhubi, Bihar and Orissa, and

(2) a sum of Rs. 1,05,750 representing the aggregate of the depreciation allowance for the half-year ending 31st December, 1926, and the arrears of depreciation allowance carried over under section 10 (2) (*vi*) (*b*) of the Income-tax Act from the previous years in respect of the plant and machinery employed in the said business.

The facts relevant to these two items are as follows:—

The petitioners were carrying on the business of rolling mills, steelmakers, etc.. at Kumardhubi under the style of the Eagle Rolling Mills. By an agreement of sale, dated 28th April, 1928, the petitioners sold the business as on and from 1st January, 1927, to a new company (hereinafter referred to as "the new company") called the Eagle Rolling Mills. Limited, which had been floated under the Indian Companies Act for the purpose of acquiring and taking over this business as a going concern and carrying on the business of rolling mills, steelmakers, etc. The old company sold the business and the new company purchased it as a going concern inclusive of the plant and machinery, book debts and liabilities, stock-in-trade, advances made, pending contracts, etc., and goodwill—this last including specifically the right to the new company to use the name of the Eagle Rolling Mills as part of their name and to represent themselves as carrying on the said business in continuation of and in succession to the old company. The

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consideration for the sale was a sum of Rs. 12,17,197 received by the old company before the sale and a promise to pay four lakhs of rupees in the aggregate out of the net profits of the new company. The old company undertook not to carry on business of the nature of that carried on in the Eagle Rolling Mills or to permit or suffer its name to be used in connection with any such business in British India. (A copy of the agreement for sale is filed, marked Ex. A.)

The Income-tax Officer held that the new company had succeeded to the old company in respect of the business carried on under the style of the Eagle Rolling Mills within the meaning of S. 26 (2) of the Income-tax Act and that assessment should be made on the new company so far as the profit or loss resulting from the working of the Mills in the previous year was concerned. He accordingly held that the old company was not entitled to have the loss of Rs. 1,33,389 set off against its other income. Similarly in regard to the depreciation allowance of Rs. 1 05,750 he held, following the decision of this Court in the case of *Massey & Co.*[1] that it was only the successor (*i.e.*, the new company) that could claim the allowance and not the predecessor (*i.e.*, the old company). He accordingly declined to allow these two items.

The petitioners appealed against the order but were not successful so far as these points were concerned.

They have now required me to state a case to the High Court and to refer the following question of law:—

"Whether the transfer by the petitioners of Eagle Rolling Mills to a limited company on the 31st December, 1925, constitutes the latter company successor to the petitioners within the meaning of S. 26 (2) of the Act."

It is agreed that the admissibility of both the deductions claimed must be decided in accordance with the answer given to the above question.

The question for decision is therefore whether the provisions of S. 26 (2) are applicable to the facts of this case. Now there is no doubt that the petitioner company was the person carrying on the business (in the ordinary acceptation of that word) known as the Eagle Rolling Mills, or that that business has been transferred as a going concern to the new company. But the contention of the petitioners is that the Eagle Rolling Mills was only a part of the business carried on by the petitioner company and that as a matter of law there can be no succession to a part of a business.

On the question of fact whether the Eagle Rolling Mills constituted a separate and distinct business there can, I think, be no two opinions, if the tests laid down by Mr. Justice Rowlatt in the case of *Scales* v. *George Thompson & Co., Ltd.*[2] be applied. There is here no "dovetailing" or "interlacing" whatever. The

1. (1929) 56 M. L. J. 451. 2. (1927) 13 T. C. 83.

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business of the Eagle Rolling Mills could be and was given up by the petitioner company while their other activities continued unaffected —the Cocotine Factory, Northern Circars Development Company, etc., went on as before. But the argument of the petitioners appears to be that because the words "any business" occurring in S. 10 were construed by this Court in the case of *M. Ar. Ar. Arunachalam Chettiar*[1] to mean "each and every business," the same meaning must be given to the same words when they occur in a different context in S. 26 (2). It is perhaps sufficient to say, with regard to this argument, that if the words "each and every" are introduced into S. 26 (2) in place of the word "any," the section becomes unintelligible. No doubt it is necessary, for the purpose of determining a person's income under the head "business," to consider the total result of his business activities as a whole. It does not follow from this that a person who in fact owns several distinct businesses must be treated for all the purposes of the Act as the owner of a single business; or that as a matter of law another person may not be held to have succeeded to one of such distinct businesses. I am of opinion, therefore, that the Eagle Rolling Mills was one of several businesses owned by the petitioner company, that the new company succeeded to this business, and that in view of the provisions of S. 26 (2) the petitioners are not entitled to the deductions claimed.

The Advocate-General instructed by *Messrs. King and Partridge* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

Beasley, C. J.

JUDGMENTS: *The Chief Justice.*—The following question has been referred to us by the Income-tax Commissioner, viz.:

"Whether the transfer by the petitioners of Eagle Rolling Mills to a limited company on the 31st December, 1926, constitutes the latter company successor to the petitioners within the meaning of S. 26 (2) of the Act."

Section 26 (2) of the Indian Income-tax Act reads as follows:—

"Where, at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

As the question referred shows, there was a transfer by the petitioners of the Eagle Rolling Mills to another company at the end of 1926. Messrs. Best & Co., the petitioners here, were up to that time the owners not only of the Eagle Rolling

1. (1923) I. L. R. 47 M. 660 : 1 I. T. C. 278 : 46 M. L. J. 68.

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Mills but of other companies carrying on a very extensive business in Madras. On the 31st December, 1926, the petitioners transferred the business of the Eagle Rolling Mills to a company formed expressly for the purpose of buying it The petitioners claimed the benefit of the deductions allowed in the shape of depreciation and also for expenditure for the purpose of earning profits in the year of account under S. 10 (2) of the Act. The Income-tax authorities, however. under S. 26 (2) assessed the new company holding that the new company had succeeded Best & Co. as owners of the Eagle Rolling Mills. The point taken here by the petitioners is that in accordance with the decision in *Commissioner of Income-tax* v. *Arunachalam Chettiar*[1] S. 10 (1) of the Indian Income-tax Act, where it deals with the ascertainment of the profits of a business, means the ascertainment of the profits of each and every business carried on by an assessee, that is to say, that the profits and losses of all the businesses can be lumped together and so can the other items allowable as deductions and the resulting profit is assessable to income-tax. It is consequently argued that the use of the words "any business" in S. 26 means "each and every business" carried on by the former owner of a business and that as, in this case, the new company has not succeeded to all the businesses which Messrs. Best & Co. own and control, S. 26 (2) has no application and that the proper persons entitled to be assessed and to claim the deductions are the petitioners. As the learned Income-tax Commissioner points out, to introduce the words "each and every" into S. 26 (2) in place of "any" would be to deprive it of any logical meaning and indeed to make an absurdity of it. It would mean this that, where a company, which owns or controls a dozen other companies, sells one of them to another company, unless the Income-tax authorities can show that the purchasing company succeeded to all the other companies owned or controlled by its vendor, it cannot be assessed under S. 26 (2). That, to my mind, is an impossible position. Section 26 was designed for the purpose of making somebody assessable to income-tax, and the whole scheme of the Act is not to assess two people at the same time but is to find somebody who is either properly assessable or more conveniently assessable; and what S. 26 (2) says is that,

1. (1923) I. L. R. 47 M. 660: 46 M. L. J. 68.

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where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed. That is not only a convenient course but seems to me to be a just one. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. Taking this view, in my opinion, our answer to the question referred must be that the new company is the successor of the petitioners. Costs to the Commissioner Rs. 250.

Ramesam, J.—I agree.

Cornish, J.—I agree.

S. R. *Reference answered in the affirmative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Rajah Inugenti Rajagopala Venkata Narasimha Rayanim Bahadur Varu .. *Respondent (Assessee).*

F. B.

The Commissioner of Income-tax, Madras v. Rajah Inugenti Rajagopala Venkata Narasimha Rayanim Bahadur.

Income-tax Act (XI of 1922), Ss. 2 (i) and 4 (viii)—Arrears of rent—Promissory notes for—Interest accruing due, if agricultural income.

Where a tenant occupying land used for agricultural purposes executes a promissory note in favour of his landlord in respect of arrears of rent of such land, the interest accruing due on such promissory note is not agricultural income within the meaning of S. 2 (1) of the Income-tax Act, 1922.

Case stated by the Commissioner of Income-tax, Madras, for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act, 1922, hereinafter referred to as the Act.

The petitioner is a Zemindar residing at Sanivarapupeta within the jurisdiction of the Income-tax Officer, Ellore Circle. His main source of income is rent derived from tenants occupying his agricultural lands. The rents are agricultural income within the meaning of the definition contained in S. 2 (1) of the Act. Whenever the rents fall into arrear the petitioner obtains promissory notes from the tenants in respect of such arrears. If the amounts due have not been paid when the notes are about to become time-barred,

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*O. P. No. 112 of 1930. 16th December, 1931.

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the tenants execute fresh promissory notes for the amounts due under the old promissory notes together with interest due up to the date of renewal. The total amount of interest that so fell due on the old promissory notes and was included in the renewed promissory notes executed during the year of account, 1928-29, was Rs. 7,374.

The Income-tax Officer included the above sum in the assessment made on the petitioner for the year 1929-30 as income from interest under the head 'business'.

The petitioner appealed to the Assistant Commissioner against the assessment but without success. He has now required me under S. 66 (2) of the Act to state a case to the High Court on certain questions of law said to arise out of the facts of the case. I am of opinion that the only question of law which arises out of the case is the following and I accordingly refer it for the decision of their Lordships.

Question.—"Where a tenant occupying land used for agricultural purposes executes a promissory note in favour of his landlord in respect of arrears of rent of such land, is the interest accruing due on such promissory note agricultural income within the meaning of section 2 (1) of the Income-tax Act, 1922."

The petitioner's contention is that the promissory notes having been executed for arrears of rent due in respect of land used for agricultural purposes the interest on the notes is part of such rent and is therefore agricultural income. But, in my opinion, where the arrears are secured by bonds and are therefore recoverable by civil suit the character of the interest as interest on a money debt is clear. The passing of the bond extinguishes the landlord's claim for arrears of rent as such, and a new contract evidenced by the bond comes into existence. He can no longer use the remedies open to him in regard to the recovery of arrears of rent. The liability loses its character as rent of land and becomes a simple money debt enforceable only in Civil Courts. It is as if such arrears of rent had been received by the landlord and equivalent amount advanced as a fresh loan on the bond. The interest on such simple money bonds is not, in my opinion, agricultural income within the meaning of the Act.

P. V. Rajamannar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—The petitioner here is the Zemindar of Kirlampudi. He has been assessed to income-tax on Rs. 7,441, as being income from money-lending. What happened was that when the ryots were unable to pay rents the Zemindar took promissory notes from them for the amount of rent with interest. The Income-tax Officer has assessed the

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Zemindar on the amount of accrued interest on such promissory notes. Mr. Rajamannar contends before us that this amount of interest must be regarded as agricultural income and he relies on S. 61 of the Estates Land Act. S. 61 says that the rate of interest on arrears of rent should be at half per cent. per mensem and S. 187 (2) prohibits the landlord from taking a higher rate of interest than that provided by S. 61. All this is no doubt quite true. But these sections only apply if a suit is brought directly on the liability of the ryot to pay rent. But in this case by a fresh contract between the Zemindar and the ryots the actual character of the liability has been changed into a loan. It has ceased to be rent and has become merely a loan; and when so converted, the sections relating to interest do not apply nor does the section which prohibits the landlord from suing in a Civil Court.

The result is that the interest cannot be regarded as agricultural income. Our answer to the question referred must be in the negative. Costs Rs. 250 to the Commissioner.

The Chief Justice.—I agree.

Cornish, J.—I agree.

S. R. *Reference answered in the negative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

The Commissioner of Income-tax, Madras .. *Petitioner** *(Referring Officer)*

v.

V. S. K. S Somasundaram Chettiar, Madura .. *Respondent* *(Assessee).*

F. B.

The Commissioner of Income-tax, Madras v. Somasundaram Chettiar.

Income-tax Act (XI of 1922), Ss. 3 and 4 (2)—Joint Hindu family doing business—Place of residence more than one, whether there can be.

The question as to what is the residence of a joint family cannot depend upon the nature of income it gets. It cannot be that the test of residence should be one thing if it is a trading family and the test of residence some other thing if it gets income from securities, property or other sources. In the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live.

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*O. P. No. 13 of 1931. 6th January, 1932.

F. B.

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The test in *Commissioner of Income-tax, Madras* v. *T. S. Firm*[1] cannot apply to what are generally described in decisions as Hindu Law partnerships, *i. e.*, partnerships which are the creatures of Hindu Law and not of the Law of Contracts.

Where, therefore, a Hindu joint family consisting of a father and manager and his son had been assessed under S. 3 of the Income-tax Act and the permanent home of the family was in the Pudukottah State though the family, from the evidence of the Commissioner, was also resident in British India and the family carried on business at various places in British India as well as beyond the seas and the Income-tax Officer sought to assess the joint family in respect of the foreign remittances on the ground that the family was resident in British India,

Held, that the joint Hindu family could be said for purposes of income-tax to be resident in British India and hence liable to assessment of income-tax for profits so remitted to British India from outside under S. 4 (2) of the Act

Case stated by the Commissioner of Income-tax, Madras, for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act (XI of 1922) (hereinafter referred to as the Act).

2. The petitioner V. S. K. S. Somasundaram Chettiar is the manager of the Hindu undivided family consisting of himself and his son. The Hindu undivided family has its permanent home at Lakshmipuram in the Pudukottah State where it has a money-lending business. It carries on piece-goods businesses both at Madura and at Madras in British India and a money-lending business at Taiping in the Federated Malay States. Besides these, the family is a partner in two concerns, one, a money-lending business at Klang in the Federated Malay States and the other, a piece-goods business at Kumbakonam, in British India. In the course of the money-lending business at Lakshmipuram loans are advanced to customers in Colombo. The family owns three residential houses at Madura, one of which is used as the business premises, the other two being let to tenants.

3. The Manager resides for the greater part of the year at Lakshmipuram in the Pudukottah State, his native place. The businesses at Madura and Madras are conducted by agents appointed by him. These agents are not empowered to act on his behalf. The Manager visits these places periodically for the purpose of supervising the businesses. During such visits he stays at Madura for varying periods as will be seen from the sworn statement given by the petitioner, a translation of which is filed, marked Ex. A. Whenever the Manager comes to Madura he resides in the business premises which are provided with a kitchen and other conveniences of a residential house. A cook is permanently employed in this place. The Manager's son, who is the other member of the Hindu undivided family, is a student permanently residing in Madura. A translation of the sworn statement given by the peti-

1 (1927) I. L. R. 50 Mad 847: 53 M. L. J. 249 (F. B.).

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tioner's Madura agent relating to these facts is filed, marked Ex. B.

4. The Manager is assessed as representing the Hindu undivided family on the income that the Hindu undivided family derives in British India from property, from the businesses carried on whether by itself or in partnership with others in British India, and on such of its profits in the firm at Klang and the business at Taiping as are remitted to it in British India. The last occasion before the assessment now in question when the Hindu undivided family was assessed on such remittance was in the year 1925-26.

5. During the year of account, 1928-29, the petitioner received in British India on various dates sums of money aggregating Rs. 40,000 from the foreign businesses at Taiping, Klang and from the customers in Colombo. These sums were received in the shape of hundials drawn payable to the petitioner at Madras. The Income-tax Officer, Madura (South), who is the assessing Officer in this case, proposed to include this sum in the assessment of the petitioner for the year 1929-30 under section 4 (2) of the Act as a remittance of profits that had accrued and arisen outside British India to the petitioner, a resident in British India and had been received in or brought into British India. The petitioner objected to the proposal and contended *inter alia* that the Hindu undivided family was not a person resident within British India to render it liable on the foreign remittances received in British India under S. 4 (2) of the Act and that therefore this sum, *viz.*, Rs. 40,000, should be eliminated from the assessment. The Income-tax Officer overruled this objection and held on the evidence before him that although the petitioner had his permanent home at Lakshmipuram in the Pudukottah State he was also a resident of British India, and as the petitioner neither contended that the remittances in question were remittances of capital nor denied the existence of sufficient profits to cover the remittances, the Income-tax Officer presumed that they were made out of the petitioner's foreign profits and accordingly included them in the assessment. An extract of the Income-tax Officer's order is filed, marked Ex. C.

6. On appeal the Assistant Commissioner confirmed the Income-tax Officer's findings for the reasons set out in his order, a copy of which is filed, marked Ex. D.

7. The petitioner now requires me to refer to the High Court the following questions of law arising out of the order of the Assistant Commissioner which I refer accordingly:—

1. "Whether the decision in *Commissioner of Income-tax, Madras* v. *T. S. Firm*[1] as regards residence is applicable only to cases of partnership and not to cases of joint undivided Hindu family business and whether that decision does not apply to the facts of the present case."

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1. (1927) I. L. R. 50 M. 847: 53 M. L. J. 249 (F. B.).

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2. "Whether there is legal evidence in support of the finding of the Income-tax Officer that the joint family firm has its residence in Madura within British India."

8. A Hindu undivided family consisting of father and son is here found to be carrying on business at various places. The actual conduct of the business is in the hands of the father, the son being a student. The family unquestionably maintains and uses a residence at Lakshmipuram in Pudukottah State, but this is not conclusive of the question raised. Viscount Sumner, in the recent case of *Commissioner of Inland Revenue* v. *Lysaght*[1] said that "in ordinary speech one residence at a time is the underlying assumption," but that "for income-tax purposes such meanings are misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed."

9. The question is, therefore, whether the family can be said to reside in British India as well as in Pudukottah State.

10. In the *T. S. Firm case*[2] their Lordships held that the physical residence of the partners of a firm was no guide to the residence of the firm. It was pointed out that "residence," as applied to a company or a firm, was an artificial and metaphorical expression, that "a company cannot eat and sleep though it can keep house and do business," and that accordingly the residence of a company or firm must be at the place or places where its central management and control are exercised. In other words, a company or firm has no existence apart from its business, and it must therefore be held to reside at the place from which it directs the business. The petitioner desires a similar line of reasoning to be applied to the facts of this case.

11. In my opinion this would be incorrect. The Hindu undivided family is not an organisation existing solely for the purpose of conducting a business. It may not carry on business at all, and in any case its functions and activities and relations are not confined to the business. It would not be true to say of it that it cannot eat or sleep. It has a residence or residences in the ordinary literal sense of the word, just as an individual may, and there is no need to determine its residence by discovering where its business is carried on.

12. The question, however, remains whether this family in the ordinary and literal sense to which I have referred resides in British India. That question is one of fact, at any rate it was held so to be by a majority of the House of Lords in *Commissioners of Inland Revenue* v. *Lysaght*[1] referred to above. The opinion, for instance, of Lord Warrington of Clyffe is as follows:—"I have reluctantly come to the conclusion that it is now settled by authority

1. (1928) A. C. 234 at 245.
2. (1927) I. L. R. 50 M. 847 : 2 I. T. C. 320 : 53 M. L. J. 249 (F.B.).

F. B.

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that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income-tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded."

13. In my opinion, therefore, the only matter which can profitably be considered here is whether there was evidence upon which the decision of the Income-tax authorities could be supported. That there was such evidence is hardly open to question. I am therefore of opinion that the second question referred to the Court should be answered in the affirmative.

T. Krishnaswami Aiyangar and *S. K Narasimhachariar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—The facts out of which this reference arises may be shortly stated as follows:—A Hindu joint family consisting of the father and manager V. S. K. S. Somasundaram Chetty and his son has been assessed under section 3 of the Act. The permanent home of the family is Lakshmipuram in the Pudukottah State where it has a money-lending business. It also carries on piecegoods businesses at Madras and Madura in British India and a money-lending business at Taiping in the Federated Malay States. It is also a partner in a money-lending business at Klang in the Federated Malay States and in a piecegoods business at Kumbakonam; and apparently it has some money-lending business in Colombo. In the year of account 1928-29 it has been found that the assessees received in British India on various dates sums of money aggregating to Rs. 40,000 from the foreign businesses at Taiping, Klang and from the customers in Colombo. The Income-tax Officer sought to assess the joint family in respect of the foreign remittances on the ground that it was resident in British India. It was contended for the assessees that the family was not resident in British India; and the Commissioner of Income-tax has referred the following questions to us, viz.:

(1) "Whether the decision in *Commissioner of Income-tax* v. *T. S. Firm*[1] as regards residence is applicable only to cases of partnership and not to cases of joint undivided Hindu family business and whether that decision does not apply to the facts of the present case."

1. (1927) I. L. R. 50 M. 847: 53 M. L. J. 249 (F. B.).

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regarding the admission or rejection of the appeal without any help from outside, that is, without hearing the respondent. It shall peruse the application and the judgment and the decree appealed therefrom and then decide the question. Of course the Court as a matter of indulgence may, if the respondent is present, allow him to help it in making up its mind, but the respondent cannot at this stage insist that he should be heard. If the Legislature thought that the respondent should be heard, it might well have embodied a provision to that effect in this proviso.

Tilak Mahto v. *Akil Kishore*, A. I. R. 1931 Pat. 183 (F. B.), dissented from.

Krishnaswami Panikondar v. *Ramaswami Chettiar*, (1917) L. R. 45 I.A. 25: I. L. R. 41 Mad. 412: 34 M. L. J. 63 (P. C.), referred to.

Parasuramudu v. *Ramanna*, (1925) 49 M. L. J. 353 and In re *Chennamma*, (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195, followed.

Application under Order 44, Rules 1 and 2 of Act V of 1908 to be allowed to appeal *in forma pauperis* against the decree of the Court of the Subordinate Judge of Devakottah in O. S. No. 98 of 1928.

T. L. Venkatarama Aiyar for petitioners.

M. Patanjali Sastri and *T. K. Sundararajan* for respondents.

The Court made the following

ORDER: *Ramesam, J.*—This is an application for leave to appeal *in forma pauperis* against the decree of the Sub-Court of Devakottah in an original suit. This petition originally came on before our brother Jackson, J., who called for a report from the Sub-Court on the pauperism of the appellants who are defendants in the original suit. The report was in their favour. The matter next came on before our brother Wallace, J., when it was claimed by the learned advocate for the respondent that he should be first heard before the petition is disposed of. Having regard to the practice of this Court not to hear the respondent at this stage, the learned Judge referred the matter for disposal before a Bench of two Judges. This is how it comes on before us. Ramesam, J.

Undoubtedly the practice of this Court has been for at least the last 32 years, during which period I have been in touch with it, not to hear the respondent on the question whether the decree of the Court below is "contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust," as provided for in the proviso to Order 44, Rule 1. I do not mean to say that a practice ought to be adhered to merely because it is of long standing, even though we now find it to be erroneous; but I think it may be

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said that a long-standing practice is *prima facie* proof that it is really correct; for otherwise some learned advocate of this Court would have objected to it and would have claimed to be heard. Anyhow, we have now to consider the question on the merits.

The learned advocate for the respondent relied upon two decisions, *Tilak* v. *Akil*[1] and *Basant Kuar* v. *Chandu Lal*[2]. In the first of these decisions a Full Bench of the Patna High Court dissented from an earlier decision of Dawson Miller, C. J., and another learned Judge and disapproving the practice of that Court came to the conclusion that the respondent was entitled to be heard as of right before leave was granted. In the second case the Lahore High Court had previously come to the same conclusion at a time when the Patna High Court followed the opposite practice. In what follows, the arguments in these two decisions will be noticed among others. In the first place it must be observed that Order 44, Rule 2 provides for an inquiry into the pauperism of the applicant and also provides that if the applicant was allowed to sue or appeal as a pauper, such further inquiry is unnecessary. Accordingly the practice of this Court has been to give notice to the respondent in cases where the appellant had not already been found to be a pauper so as to give him an opportunity to show that the applicant is not a pauper. Order 44 does not provide for a notice to be given to the respondent in all cases. The proviso to Rule 1 says,

> "The Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think.... ...."

On the face of it this suggests that the Court should come to its conclusion about the erroneous nature of the Lower Court's decree on a perusal of the application and the judgment and decree appealed against. At this stage even the rest of the record ought not to be seen. Vide *Veerappa Chetty* v. *Ma Tin*.[3] If it was intended by the Legislature that the Court should issue a notice to the respondent before granting leave, this proviso would have expressly referred to it. It would have run:

> "Upon a perusal thereof and of the judgment and decree appealed from, and upon hearing the respondent after notice, etc."

1. A. I. R. 1931 Pat. 183 (F. B.)
2. A. I. R. 1929 Lah. 514.
3. A. I. R. 1925 Rang. 250.

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or some words to that effect. *Prima facie*, therefore, a notice to the respondent is not contemplated by the rule, and it cannot be said that at least in those cases where notice has gone in respect of the pauperism the respondent has a claim to be heard This will introduce an anomaly that in one set of cases the respondent has got a right to be heard before leave is granted and in another set he has no such right, the difference merely arising out of the fact that the applicant has or has not been previously found to be a pauper. To avoid this anomaly the learned advocate for the respondent contends that the respondent is entitled to be heard in all cases, and in support of this proposition he relies on Form No. 11 in Appendix G to the Civil Procedure Code. In the Form the notice is thus described:

"Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper," etc

It seems to me that the Form appended to the Code should not be allowed to extend the meaning of the sections and the rules in the Code. The Form has to be construed with reference to Order 44, Rule 1 and not that Order 44, Rule 1 should be construed with reference to the Form. In my opinion, [illegible] No. 11 only refers to cases where notice is given with [illegible] and the respondent is given an [illegible]tice is given only with reference [illegible] only gives an opportunity to the [illegible] applicant is not a pauper. It has [illegible]rence to the question mentioned in the [illegible]

[illegible]ned advocate next argued that in the first part of [illegible] provisions applicable to suits by paupers are extended [illegible]peals "in so far as those provisions are applicable; and [illegible]at Order 33 which is applicable to pauper suits shows that a pauper application should be rejected if the allegation in the plaint do not show a cause of action. Rule 7, cl. (2) which refers us to Rule 5 shows that if the plaintiff's allegations do not show a cause of action, the pauper application should be rejected. But reading Rules 7 and 5, it is clear that the provisions of these rules are not directly applicable to pauper appeals. They are applicable only if the language of these rules can be altered. In my opinion, these rules are not applicable to appeals and because these rules are not applicable and the Appellate Court cannot address itself to the question

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whether the plaint shows a cause of action, the Legislature proceeded to enact a provision analogous in the proviso, *viz.*, that the Appellate Court should address itself to the question whether the Lower Court's decision is erroneous or unjust. The insertion of the proviso is practically an additional argument that Rules 5 and 7 are inapplicable to appeals. The applicability of Rules 5 and 7 is one of the main grounds for the conclusion of the Patna High Court. But for the reasons mentioned above, I am unable to agree with the decision of that Court.

It is true that both in the case of pauper suits and pauper appeals the Legislature thought it necessary to impose some limitation on the right of suit or appeal *in forma pauperis* for the protection of the litigant opposed to the pauper from frivolous suits or appeals. Such protection in the case of suits appears in Order 33, Rule 5. This rule not being applicable to appeals, analogous protection in the case of appeals is mentioned in the proviso. Once the proviso is there, I do not think we can fall back upon Order 33, Rules 5 and 7. The proviso being complete by itself, we cannot import into [illegible] the idea that apart from the rule th[illegible] of general principle, entitled to not[illegible] is true that an order passed with[illegible] ought not to be binding upon him[illegible] once having been given the order g[illegible] that the judgment appealed against is err[illegible] law; and at the actual hearing of the appe[illegible] would have an opportunity of showing that the d[illegible] against is in accordance with law and is not e[illegible] unjust. So that, I do not agree with the Lahore Hig[illegible] in thinking that if leave is granted it amounts to an or[illegible] binding on the respondent without his having been heard. Mr. Patanjali Sastri relied on the analogy of a decision in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*[1] where the Privy Council observed that before excusing the delay in the filing of appeals, notice should always go to the respondent in the first instance. That relates to an entirely different matter and I do not see any analogy between the two proceedings. At the end of the period prescribed for filing an appeal the

1. (1917) L. R. 45 I. A. 25: I. L. R. 41 M. 412: 34 M. L. J. 63 (P. C.).

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respondent gets a vested right in the judgment and that right ought not to be lightly disturbed and therefore notice ought to go to him before the delay is excused. But apart from that consideration the real ground for the observation of the Privy Council was that there should be no uncertainty about the question of the delay in filing the appeal until the final hearing of the appeal and until heavy costs are incurred.

I do not mean to say that if the Court is inclined to hear the respondent before making the order it may not hear. I do not suggest that there is anything illegal if the Court hears the respondent. All that I intend to lay down is that the respondent is not entitled to be heard as a matter of right and the Court is not bound to hear him. In my opinion the present practice is salutary and the opposite practice will either lead to double expenditure of time or to injustice. Above all, this conclusion of mine is supported not only by the plain language of the proviso which uses the word "perusal" but also two decisions of our Court. Vide *Parasuramudu* v. *Ramanna*[1] and In re *Chennamma*[2]. In this particular case we think leave to ap[illegible] [illegible]ted. I accordingly give leave.

[illegible] entirely agree. The questio[illegible] [illegible] practice of this Court not [illegible] leave is granted to the appellant [illegible] *forma pauperis* is in consonance with [illegible] Code of Civil Procedure relating to paup[illegible] [illegible] respondent has come before us in response [illegible]sued to him in connection with the inquiry into t[illegible] [illegible]sm of the appellant. He now contends that at th[illegible] [illegible]ge he is entitled as of right to be heard on the questio[illegible] whether the decree of the Lower Court is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

The answer to the point raised by the respondent is, in my opinion, to be found in the proviso to Rule 1 of Order 44 which relates to the procedure on the application made by a pauper for the admission of his appeal. The proviso runs

1. (1925) 49 M. L. J. 353.
2. (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195.

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thus:

"Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

Prima facie there is nothing in this proviso to show that the respondent should be heard before the admission of the appeal filed by a pauper. It states that the Court shall peruse the application, and the judgment and the decree appealed therefrom and shall reject the application unless it sees reason to think that the "decree is contrary to law . . . unjust". It is clear from this that the Code enjoins upon the Court to make up its mind by itself regarding the admission or rejection of the appeal without any help from outside, *i.e.*, without hearing the respondent. It shall peruse the application and the judgment and the decree appealed therefrom and then decide the question. Of course the Court as a matter of indulgence may, if the respondent is present, allow him to help it in making up its mind, but I do not think the respondent can at this stage insist that he should be heard. If the Legislature thought that the respondent should be heard it might well have embodied a provision to that effect in this prov[illegible]

Two main grounds are urged [illegible] of his contention that he has a rig[illegible] is granted to the appellant. First, h[illegible] Appendix G to the Code of Civil Proce[illegible] the notice of appeal *in forma pauperis* [illegible] Rules 1 and 2. The notice is in these terms:

"Notice is hereby given to you that if you desire to show [illegible] applicant should not be allowed to appeal as a pauper an opportu[illegible] given to you of doing so on the aforementioned date."

In my opinion this Form should not be interpreted in a way which will modify the provision of the Code already referred to which is very explicit. As pointed out by my learned brother this Form refers to cases where notice is given to the respondent with respect to the inquiry relating to the pauperism of the appellant and in such cases the respondent may argue that the applicant is not a pauper. It should be remembered that the respondent has no right to receive notice in all cases. I do not think that because notice is issued to the respondent in connection with the inquiry into the pauperism of the appellant, he has a right to take advantage of this opportunity to argue that

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the appeal should not be admitted. If this privilege is accorded to him then the scope of the proviso to Rule 1 of Order 44 is considerably extended.

The next argument of the respondent has reference to Rule 1 of Order 44. This rule states that pauper appeals are

"..........subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable."

Order 33 contains the provisions relating to suits by paupers. Rule 5 of this Order specifies the various grounds on which a Court shall reject an application to sue as a pauper one of which is where the allegations in the suit do not show a cause of action. If the petition is not rejected then the Court shall fix a day of which notice will be given to the Government Pleader and the opposite party for receiving evidence as to the pauperism of the applicant (*see* Rule 6). On the day so fixed, after taking the evidence produced before it, sub-rule (2) of Rule 7 says that

"the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5".

Under these provisions it is clear that when the pauperism of the applicant is enquired into the respondent has a right to be heard on the question whether the applicant is or is not subject to any of the prohibitions contained in Rule 5. It has been held by the Patna High Court that by force of Order 44, Rule 1, Rules 5 and 7 of Order 33 are applicable to pauper appeals, and as under these rules the respondent is as a matter of right entitled to be heard, so he has a right to be heard when leave to appeal *in forma pauperis* is granted to the appellant. This decision is strongly relied on by the respondent in support of his contention. It seems to me that having regard to the language of Rules 5 and 7 the provisions of those rules cannot be applied to pauper appeals. Further, special provision with regard to the procedure to be adopted for the admission of pauper appeals is enacted in the proviso to Rule 1 of Order 44. This shows clearly that the Legislature never intended that Rules 5 and 7 of Order 33 should be applied to pauper appeals. A procedure for the admission of the pauper appeals complete in itself having been provided for in

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the proviso to Rule 1, there is no need to refer to other provisions of the Code to supplement that procedure. For these reasons I am, with great respect, not inclined to accept the reasoning in *Tilak* v. *Akil.*[1] The fact that the appellant is allowed to appeal *in forma pauperis* does not mean that the respondent is precluded from arguing at a later stage that there is no substance in the appeal and that it should be dismissed.

Lastly, it was urged having regard to the decision of the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*[2] that as in the case of the successful party in a time-barred appeal who has obtained the "valuable right" of a final decree in his favour by mere effluxion of time, the respondent here has also acquired "the valuable right" of a final decree in his favour on account of the "pauperism" of the appellant, and that therefore as in the other case the respondent in this case also should be heard at the time when the appeal is admitted. It is clear to my mind that the two cases are not at all similar and that the observations of the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*[2] have no bearing on the question before us which in my opinion should be decided with reference to the special rules provided for the purpose in the Code itself.

The view that I have taken of the proviso to Rule 1 of Order 44 is supported by two decisions of this Court. In *Parasuramudu* v. *Ramanna*[3] Srinivasa Aiyangar, J., expressed the opinion that he was not satisfied that "he (the respondent) has got any *locus standi* to appear at this stage and require to be heard. . . ." In In re *Chennamma*[4] it was held that

> "Order 44, Rule 1 of the Civil Procedure Code does not contemplate that, before granting leave to appeal *in forma pauperis*, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust; it is enough if the applicant shows that he has *prima facie* a good case, and if he does so, leave to appeal should be granted." (*See* the head-note.)

This decision shows by implication that the respondent has not under Order 44, Rule 1 a right to be heard, for, if he has such a right the Court would be in a position to arrive at a

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1. A. I. R. 1931 Pat. 183 (F. B.).
2. (1917) L. R. 45 I. A. 25: I. L. R. 41 M. 412: 34 M. L. J. 63 (P. C.).
3. (1925) 49 M. L. J. 353.
4. (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195.

definite and final conclusion on the question whether the decree complained against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, which according to this decision is not contemplated by the rule.

For the above reasons I would overrule the respondent's arguments that he has a right to be heard at this stage.

I agree with my learned brother that in this case leave to appeal as a pauper should be granted.

K. C. *Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

P. V. S. Krishnamurthi Pillai and another by guardian Kokilambal Ammal .. *Appellants** *(Plaintiffs)*

v.

P. V. S. Sundaramurthi Pillai and others .. *Respondents* *(Defendants).*

Presidency Towns Insolvency Act (III of 1909), Ss. 7, 18 and 36—Insolvency of Hindu father—Question as to binding nature of debts—Decision by Insolvency Court—Permissibility—Son's non-appearance—Power of Court to summon—Partition suit—Insolvent impleaded as party defendant—Jurisdiction of Court to stop suit—Hindu father whether justified in bringing a suit against son for money claim on the ground of his right to sell son's share—Power of attorney—Whether revocable by insolvency of donor.

Wide as the provisions of S. 7 of the Presidency Towns Insolvency Act are, it does not follow that every possible dispute between the Official Assignee and the sons can be dealt with under S. 7. So long as the son has not appeared before the Insolvency Court no question can arise between him and the Official Assignee and the question as to the binding nature of the father's debts cannot be decided in insolvency behind the back of the son at the instance of the Official Assignee. The Insolvency Court has no jurisdiction under S. 36 to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and son. Such question must be decided in a partition suit to which the Official Assignee is a party.

In re *Balusami Aiyar,* (1928) I. L. R. 51 Mad. 417: 55 M. L. J. 175 (F. B.) and *Ramachandra Aiyar* v. *The Official Assignee of Madras,* (1930) I. L. R. 54 Mad. 739: 61 M. L. J. 66, considered.

A partition suit which the sons of a Hindu father file to separate the property of the insolvent from the properties of the other sharers is not a suit involving a claim against the insolvent except in so far as it may involve a claim to account or claim for money decree against the insolvent. It will be extraordinary if the Insolvency Court in the exercise of powers vested

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*O. S. Appeals Nos. 3 and 30 of 1930. 21st September, 1913.

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under S. 18 should stop partition suits in which the insolvent happens to be a party defendant

The Hindu father can never sue the son for a money decree simply because he has got a right to sell the son's share. The effect of a Hindu joint family law is to give the father or creditor a right to sell the son's share and no more.

Observations of *Curgenven, J.*, in *Ramachandra Aiyar* v. *The Official Assignee of Madras*, (1930) I. L. R. 54 Mad. 739: 61 M. L. J. 66, dissented from.

Where an unregistered power-of-attorney was executed by the debtor in favour of the creditor by which the creditor was authorised to collect rents from the tenants on the land and to let the premises to some other tenant or tenants in the event of a vacancy and by a letter of the same date the creditor was authorised to appropriate the rents so collected by him towards interests due to him on the loan, and the debtor undertook not to cancel the power-of-attorney till the debt was discharged,

Held, that as to rents which were to accrue in future, they were not property in existence and it could not be said that the creditor had an interest in such property. This did not amount to a mortgage or a transfer of interest in rent so as to bind the Official Assignee. Hence the power-of-attorney could not be held irrevocable against the Official Assignee by the debtor's subsequent bankruptcy.

A power-of-attorney must, as a general rule, be treated as revoked by the insolvency of the donor of the power as against the trustee under subsequent bankruptcy.

See Williams on Bankruptcy, 13th Ed., p. 331.

On appeal from the judgment and decree of the Honourable Mr. Justice Kumaraswami Sastri, dated 22nd January, 1929, and made in C. S. No. 83 of 1927 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

A. Parameswaran and *K. Gopalaswami* for appellants in O. S. A. No. 3 of 1930.

O. T. G. Nambiar instructed by *Messrs. King and Partridge, C. Srinivasachari, R. Swaminatha Aiyar, V. Viswanatha Sastri, A. Ramachandra Aiyar* for *Abdur Rahim* and *Devarajan* for respondents in O. S. A. No. 3 of 1930.

V. Visvanatha Sastri for appellant in O. S. A. No. 30 of 1930.

A. Ramachandra Aiyar and *A. Paramasivan* for respondents in O. S. A. No. 30 of 1930.

The Court delivered the following

Ramesam, J.

JUDGMENTS: *Ramesam, J.*—The facts out of which these appeals arise are briefly these: One P. Venkatachalam was a well-known condiment and ice manufacturer of Madras. He acquired considerable property and died. One of his sons Subbaraya Pillai predeceased him leaving a son Sundaramurthi. Another son of P. Venkatachalam, namely, Subramania Pillai, was appointed executor of his last will and testament. Another

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Rs. 35,000 and Rs. 12,800 required for the above two transactions. He therefore approached Mr. Doraiswami Aiyar for a loan to enable him to complete these two transactions. He had also borrowed from Mr. Doraiswami Aiyar other sums of money amounting to nearly Rs. 12,000 for his business which was described to be some dealings in fibre through a company in Salem known as Rockforts & Co. When the 1st defendant borrowed these various sums of money amounting to Rs. 12,000 he sub-mortgaged in favour of Mr. S. Doraiswami Aiyar an equitable mortgage which he held from Mr. L. A. Govindaraghava Aiyar of a house named "Palm Grove" in Mylapore. On the 31st August an account was made of the total amount due from the 1st defendant to Mr. S. Doraiswami Aiyar and it was found to be Rs. 62,212-12-4—Mr. Doraiswami Aiyar having undertaken the liability to pay the amounts of Rs. 35,000 and Rs. 12,800 for the sales. At about this time the 1st defendant approached Mr. D. K. Asher, Secretary and Trustee of the 4th defendant, who is described as Sri Madan Mohanji Temple. He represented to Mr. Asher that money was required for the purpose of completing the purchase of the two houses from Loganatham and for family business. On the representation of the 1st defendant Mr. Asher on behalf of the temple advanced a sum of Rs. 25,000 on the 11th August, 1923, under Exhibit II. As a matter of fact this sum of Rs. 25,000 raised by the 1st defendant was not utilised by the 1st defendant for the purpose of discharging the debt incurred in connection with the sales but for some other business of his own. We have already seen that ultimately Mr. Doraiswami Aiyar took on himself the task of paying Rs. 12,800 and Rs. 35,000 payable under the sales, but up to the 11th August (the date of Exhibit II) the transaction had not yet been settled. On the representation of the 1st defendant Mr. Asher lent the money. On these facts the learned Judge found that there was an antecedent debt and the mortgage was made by the 1st defendant representing that money was required for the purpose of paying off debts and therefore it was binding on the plaintiffs. We agree with the finding. The fact that the 1st defendant did not actually utilise this amount for the purpose of the sales but for some purpose of his own does not matter. The result is that O. S. Appeal No. 3 must be dismissed with costs. Respondents Nos. 2, 3

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and • 4, 5 and 7 will each get one set (in all four proportionate to the value of their claims. The appellan not press the binding nature of the debts of the respondents in this appeal.

There is a memorandum of objections filed by th defendant Rangayya in this appeal. It will be conve to take up the memorandum of objections with his own A No. 30 of 1930 as the points covered by both are practicall same.

Coming to O. S. Appeal No. 30 of 1930, the facts rel to this appeal are these: The appellant is a money-lend Madras. He is also a joint trustee of some temple. the 5th November, 1926, the 1st defendant borrowed a of Rs. 4,000 and executed a promissory note for the am Exhibit XVII. On the same day he executed a powe attorney and an agreement enabling the creditor to collec rents of the two houses Nos. 76 and 77, Poonamallee Road and to let them out to others, if necessary, if the tenants vacated the premises. This is Exhibit XXVIII. the same day he wrote letters to the tenants asking them to rents to Rangayya. The tenants replied agreeing to d Sundaramurthi also wrote another letter to Rang undertaking not to cancel the power-of-attorney and not to with the properties until the debt is discharged. Exhibit XXIX to which these are enclosures. On 9th M 1927, the 1st defendant executed in favour of Rangayya an promissory note for Rs. 2,000—Exhibit XXXIV. The one other document on the record which is found sti along with the power-of-attorney, Exhibit XXVIII, whicl purports to bear the date 5th November, 1926. It purpo be an agreement to execute a mortgage within three montl the two houses Nos. 76 and 77 in respect of which power-of-attorney was executed. On the basis of this a ment Rangayya filed a suit C. S. No. 40 of 1929 fo specific performance of the agreement by execution mortgage deed. This suit came on before Waller, J., found that the agreement was ante-dated and that it was executed on 9th March, 1927 and therefore dismissed the O. S. A. No. 30 is against this decree. The grounds rais this appeal were also raised by Rangayya in the memora

of objections he filed in O. S. A. No. 3 of 1930. It will, therefore, be convenient to dispose of these together.

In the partition suit the Official Assignee remained *ex parte*. He did not file a written statement, nor did he raise any ground on the question of the genuineness of the loan of Rs. 4,000 and Rs. 2,000. The learned Judge Kumaraswami Sastri, J., observed in his judgment:

"The amount borrowed from the 6th defendant is Rs. 6,000. He is a professional money-lender and I think that 22½ per cent. interest with an agreement to give security is exorbitant. . . . It is argued for the 1st plaintiff that although Rs. 2,000 was lent before the insolvency, it was after the act of insolvency complained of in the adjudication petition and that this amount is not payable. That will be a matter for the Official Assignee to come by a separate application, if he is so advised, in the insolvency proceedings. But so far as this suit is concerned I think Rs. 6,000 is due as there is no defence raised of want of consideration, and that the 6th defendant is entitled to that amount with interest at 12 per cent. per annum from the dates of the loan up to the date of payment."

He then observed that the Rs. 2,000 being lent after the filing of the partition suit, would not in any event be binding upon the 1st plaintiff. In spite of the above findings there are no objections raised by the Official Assignee that the debts themselves are not due. We must therefore agree with the finding of the learned Judge that the amount of Rs. 6,000 was due to the 6th defendant. That being so, the question whether the amount was actually lent is *res judicata* between the parties in the later suit C. S. No. 40 of 1929 and it is not open to the defendant in the later suit to raise the question of consideration. On this ground we do not agree with the observations of Waller, J., in the second suit:

"It is most improbable that any one would have lent him Rs. 4,000 merely on the agreement . . . . . Still less likely is it that the further Rs. 2,000 would have been lent four months later."

I think it is not open to raise the question whether consideration has passed as it has been previously found in the first suit and no objection was raised in O S. A. No. 3 by the Official Assignee, nor was any ground raised by the appellant-plaintiff in appeal against him. We must, therefore, assume that the Rs. 6,000 was lent by Rangayya to Sundaramurthi. Only so far as the second loan is concerned, Sundaramurthi is liable for the amount and not his son, as the loan was given after the suit for partition was filed. It has been repeatedly held by the Judicial Committee that the filing of a suit for partition effects a severance in status from the date of the filing of the plaint. This is subject only to the condi-

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tion that the suit terminated in a decree and is not withdrawn. In the present case the suit for partition was filed on 11th February and the loan of Rs. 2,000 was advanced on 9th March and therefore it cannot bind the son.

The next question we have to discuss in this appeal is whether the agreement on which the suit for specific performance was based was ante-dated. Waller, J. in his judgment observes that the promissory note, the letter and the power-of-attorney are signed with the same ink, but it is quite different from that used on 9th March. Though the agreement bears the date 5th November, the ink is the same as that of 9th March. Though no doubt such a thing is possible, still this is certainly rather a curious circumstance and taken with the other circumstances in the case supports the case for the respondents. It is significant that the agreement was not mentioned in any of the other documents executed on 5th November, 1926, namely, the promissory note, the power-of-attorney and the letter. We are, therefore, inclined to agree with Waller, J., that this agreement was really ante-dated. We are not, therefore, prepared to give a decree for specific performance on the basis of this letter which was actually executed on 9th March, that is, after Sundaramurthi became an insolvent. Though the actual adjudication was on 14th March, the adjudication dates back to the act of insolvency, namely, 19th February.

Mr. Visvanatha Sastri, the learned advocate for the appellant, then contended in the alternative that even apart from the agreement he had already an equitable mortgage or at least an irrevocable power-of-attorney creating an interest and that these are enough to be binding on the Official Assignee and that also on the ground of part performance he is entitled to stand in the position of a mortgagee. The power-of-attorney creates an interest only in the rents and not in the property. The learned advocate relied on Bowstead on Agency, Art. 138. According to this Article where the authority of an agent is given by deed for the purpose of protecting or securing any interest of the agent it is irrevocable during the subsistence of such interest. As already observed the only interest created is in the rents. There is no interest in the immovable property. So far as rents had already accrued, one may say that the creditor Rangayya

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acquired an interest in them and until that interest is realised, the agency is irrevocable. But as to rents which are to accrue in future, they are not property in existence and it cannot be said that the creditor has an interest in such property. The utmost is there is only an agreement which enables him to collect rents of the property after they accrue. This does not amount to a mortgage or transfer of the interest in rent so as to bind the Official Assignee. In the partition suit Mr. A. K. Ramachandran was appointed receiver on 23rd March. Immediately after his appointment he gave notice to tenants demanding them to pay rent. Mr. Visvanatha Sastri replied on behalf of Rangayya by Ex. XXXII claiming some right over these rents and mentioning that he had also written to the Official Assignee. Mr. Ramachandran replied that he took charge of the property under orders of Court and suggested to him to apply to the Court—Ex XXXII-A. It was as a result of this correspondence that Rangayya was made a defendant in the partition suit. Practically he lost possession of the property. It is true that he was authorised to let the premises to other tenants if the original tenants vacated. But this is different from his being authorised to get into possession. Art. 138 of Bowstead on Agency declares that an authority expressed to be irrevocable in the article is not determined by the bankruptcy of the principal. But, as I have already observed, the power-of-attorney is effectual as conveying his interest only as to rents that have accrued; neither as to future rents nor as to the property can it prevent its vesting in the Official Assignee. The learned advocate also relied on Coote on Mortgages, page 61 and a number of English cases cited therein. It must be remembered that there is no law of registration in England and where possession is given for the purpose of securing a debt it will easily be construed as a mortgage—a process not permissible in India; and an equitable mortgage can be made here only by deposit of title-deeds. It is admitted that the title-deeds of the two houses in the Poonamallee High Road were really with the 2nd defendant, the Royal Bank of Scotland, and were not deposited with Rangayya. In *Spooner* v. *Sandilands*[1] a warrant of attorney which was executed as collateral security authorised the creditor to take possession of the lands. In the present case

1. (1842) 62 E. R. 939.

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the power-of-attorney authorised Rangayya only to let the premises again to other tenants and not to take possession himself. In In re *Davis & Co.* Ex parte *Rawlings*[2] the property assigned consisted of a definite number of instalments in respect of a hire purchase agreement relating to property and it was held that the assignment was valid against the trustee in bankruptcy. But in the case before us the rents accruing due in future cannot be regarded as property *in esse* and therefore there can be no valid assignment of the rents so as to bind the Official Assignee. Rent does not accrue unless there is a tenant occupying the premises. As a matter of fact, one of the tenants vacated one of the houses almost immediately after the transaction and it remained vacant. No rent can accrue unless a new tenant occupies the house. Therefore the assignment of rent to accrue in future cannot be regarded as assignment of property *in esse* and even then it does not avail to give a mortgage over the property. It is true that contracts enforceable against an insolvent may be enforceable against the Official Assignee, though even then there is a discretion in the Court—vide *Nagarathna* v. *Chidambaram.*[3] But in the present case we find that there was no agreement in November, 1926. Mr. Visvanatha Sastri relied on *Official Assignee* v. *Fakirji Cowasji*[4], where it was held that though legal formalities had not been complied with equity treats the transaction as an agreement to make over the benefit of the mortgage which will be enforced. But in this case there is no agreement to mortgage, nor is there any equitable mortgage. That being so, there is nothing to enforce. The result is that O. S. A. No. 30 of 1930 in so far as it is against the decree refusing specific performance must be dismissed with costs of the 2nd respondent, the Official Assignee—1st respondent (one set) in both Courts. Any other finding in the judgment as to consideration must be vacated.

We now come to the memorandum of objections filed by the Official Assignee in O. S. A. No. 3 of 1930; he complains against the direction in clause (6) of the decree (at page 72) that as regards debts which the 1st defendant has contracted, if the 1st plaintiff is proceeded against by the creditors, the

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2. (1888) 22 Q. B. 193.
3. A. I. R. 1928 Mad. 860.
4. A. I. R. 1930 Sind 77.

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1st defendant is liable to make good to the 1st plaintiff the loss occasioned to him by such proceedings. I think this complaint is justified. All that has been laid down in the cases is that in a suit for partition provision must be made for the payment of father's debts and the rest of the property must be divided—*Venku Reddi* v. *Venku Reddi*[5]. The decree in this case directs that, whenever creditors proceed against the plaintiff, in the first instance the plaintiff is entitled to contribution from the 1st defendant. This kind of accounting between father and son in respect of pre-partition debts cannot be allowed. In the present case all the properties are sold by the receiver and so far as the secured creditors are concerned most of their debts have been paid off. But it happens in many cases that some more amounts are due. The whole debt due to the 2nd defendant remains due and the amount realised is lying in Court. No part of this money ought to be paid to the 1st plaintiff until all the debts of the father are paid off and only in the balance so left the plaintiff should get a half share. In this case it seems to be practically admitted that the funds now lying in Court will not be enough to pay off all the debts binding on the son. Whether it is so or not, in this case on the report of the Official Referee a further direction will have to be given for paying off all the debts binding on the son and the balance will be divided. There is no need for a direction of the kind mentioned in cl. (6) of the decree. Clause (16) of the decree directs that the Official Referee should take accounts and submit his report and proceedings to this Court. We are informed that on an *ex parte* application made by the Official Assignee before Waller, J., without giving notice to the various creditors he passed an order staying further action on the part of the Official Referee and directed the amount lying in Court to be paid into the hands of the Official Assignee. But on further application made by the creditors an order was obtained from another Bench consisting of Beasley, C. J., staying this portion of Waller, J.'s order and directing that the amount should remain in Court to the credit of the partition suit. We thus see a sort of conflict between the insolvency jurisdiction and the ordinary jurisdiction of this Court and it is desirable to indicate a procedure so as to avoid this conflict. It has been

5. (1926) I. L. R. 50 Mad. 535: 52 M. L. J. 387 (F. B.).

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held in *Sat Narain* v. *Behari Lal*[6] that the insolvency of a father does not involve the insolvency of the son and the son's share does not vest in the Official Assignee though the father's power to sell the son's share for debts binding on the family may vest in the Official Assignee. But it was held by a Full Bench in In re *Baluswami Aiyar*[7], that such power of sale terminates with the severance of the joint family status. In the present case neither the father nor the Official Assignee has any power to deal with the son's share after 11th February, 1927. In the course of argument in that case there was a suggestion that wherever a partition is allowed to have this effect the Official Assignee's rights are prejudiced by the partition and with reference to that suggestion which found favour with my brother Phillips, J., I observed that no substantial right of the Official Assignee was affected but only that one of several remedies open to him was lost. I tried to enumerate these remedies. The first I mentioned was that the Official Assignee associating himself with the creditors can file suits against the sons and obtain decrees. Secondly, I suggested that in the suit for partition he can be made a party and he can ask for decrees in favour of the creditors. I then observed:

> "There is possibly a third remedy open. The Judge sitting in insolvency may, if he thinks proper, decide the question raised by the Official Assignee as between himself and the sons *provided the sons fill* the character of garnishees."

At page 443, I again repeated the observation that, if the Judge sitting in insolvency thinks it would serve any purpose that he should enquire into the binding nature of the debts, he may do so *provided the sons fill the character of garnishees.* In that case whether the sons can fill the character of garnishees was not argued before us and I did not decide the question. Because I did not like to decide the question whether they did or did not fill the character of garnishees, I said that the Judge sitting in insolvency may enquire into the matter provided the sons fill the character of garnishees; and I preceded my observation with the word 'possibly' because if the sons did not fill the character of garnishees this third remedy does not exist. Relying on my observations Curgenven and Bhashyam

6. (1924) L. R. 52 I. A. 22: I. L. R. 6 Lah. 1: 47 M. L. J. 857 (P. C.).
7. (1928) I. L. R. 51 Mad. 417: 55 M. L. J. 175 (F. B.).

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Aiyangar, JJ., in a later stage of the same case reported as *Ramachandra Aiyar* v. *Official Assignee of Madras*[8] said that there is no objection to the question of the binding nature of the debts as between father and son being decided in insolvency proceedings at the instance of the Official Assignee. At p. 748 Curgenven, J., after quoting from my judgment, proceeds to refer to the Full Bench decision in *Official Assignee of Madras* v. *Narasimha Mudaliar*[9] about the scope of S. 7. He then refers to *Ramasomayajulu* v. *Official Receiver, Godavari*[10] and *Maharaj Bahadur Singh* v. *Forbes*[11] as instances where S. 7 has been utilised. The learned Judge then proceeds to observe:

"On the other hand, it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no authority for the view that, if it should suit the Official Assignee, as representing the insolvent, to bring what would in effect be a suit for partition, the Insolvency Court would have no jurisdiction to entertain it."

With reference to these observations of the learned Judge I wish to make the following observations. Wide as the provisions of S. 7 of the Presidency Towns Insolvency Act are, it does not follow that every possible dispute between the Official Assignee and the sons can be dealt with under S. 7. Section 7 says that "the Court shall have full power to decide all questions of priorities . . . . . which may arise in any case of insolvency and decide all other questions". So long as the son has not appeared before the Insolvency Court, I do not see how any question can arise between him and the Official Assignee. If the son himself chooses to appear before the Insolvency Court and raises questions as to the binding nature of a debt it may perhaps be decided, but so long as he does not choose to appear I do not see how any question of the binding nature of the father's debts can be decided in insolvency behind the back of the son at the instance of the Official Assignee. The question then arises whether the Official Assignee can take steps to compel the son to appear before the Insolvency Court and have the question adjudicated. The only section which enables the Court to do anything on the application of the Official Assignee is section 36 which says:

"The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication

8. (1930) I. L. R. 54 Mad. 739: 61 M. L. J. 66.
9. (1929) I. L. R. 52 Mad. 717: 57 M. L. J. 145 (F. B.).
10. (1925) 23 L. W. 80.
11. (1920) L. R. 48 I. A. 24: 40 M. L. J. 141 (P. C.).

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has been made, summon........the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property."

None of these descriptions apply to the son. The half share of the son which is liable to be sold by the father or the Official Assignee to pay off the father's debts which are not immoral or illegal does not become the property of the insolvent. It is only the power of sale which the father and the Official Assignee possess. This power does not convert the son's property into the insolvent's property, especially when we remember that the power ceases to exist on the severance of the joint family. In my opinion the Insolvency Court has no jurisdiction under S. 36 to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and son. The word 'garnishee' is not used in the Presidency Towns Insolvency Act. Whether a person fills the character of a garnishee merely depends upon the language of S. 36. The learned Judges, Curgenven and Bhashyam Aiyangar, JJ., have not discussed the terms of S. 36 in coming to the conclusion that the questions between the Official Assignee and the son can be decided in the Insolvency Court. I am also clearly of opinion that no suit for partition can ever be filed in the Insolvency Court by the Official Assignee representing the father. The Insolvency Court exists to distribute the assets between the creditors, and not for deciding partition suits or other questions between the insolvent and the rest of the world. Section 7 enables the Court to decide only such questions as may incidentally arise. But when the son is not a party to the insolvency proceedings, no such questions can arise between him and the Official Assignee and the son can never be summoned under S. 36. The English case relied on by the learned Judges only enables important questions to be determined before distribution is made. It cannot enable partition suits to be filed before the Insolvency Court or to compel persons who do not fall under the description of S. 36 to be summoned before the Insolvency Court. I am therefore of opinion that no question between the Official Assignee and the son can be decided by the Insolvency Court but they must be decided in a partition suit to which the Official Assignee is a party. I do not agree with the observa-

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tion of Curgenven, J., that by money claim is meant any claim which can be ranked as divisible assets nor can it be said that because the father has got a right to sell the son's share in the joint family he has got a money claim against the son. The father can never sue the son for a money decree simply because he has got a right to sell the son's share. The effect of the Hindu joint family law is to give the father or creditor a right to sell the son's share but no more. We ought not to extend this privilege so as to convert it into a money claim.

In the partition suit we have already found that the debt of Rs. 2,000 is not binding on the son and that the debt of Rs. 4,000 is binding on the son. So far as the half share of the father in the net proceeds of the sale is concerned, it should be handed over to the Official Assignee because it vests in him and the Official Assignee may proceed with further distribution of that sum in the insolvency jurisdiction, but so far as the half share of the son in that amount is concerned the Official Assignee has no right to ask that amount to be paid to him either under Section 7 or Section 36 of the Insolvency Act and all further proceedings in connection with that fund must be for the purpose of distributing it to such of the creditors whose debts are binding in the partition suit. In my opinion the Insolvency Court has no power to stay proceedings in the partition suit now pending before the Official Referee so far as the son's share is concerned. The learned advocate for the Official Assignee relied on Section 18 of the Act which says:

"The Court may... ....stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court."

In my opinion a partition suit which the sons file to separate the property of the insolvent from the properties of other sharers is not a suit involving a claim against the insolvent except in so far as it may involve a claim to account or a claim for money decree against the insolvent. It will be extraordinary if the Insolvency Court in the exercise of powers vested under Section 18 should stop partition suits in which the insolvent happens to be a party defendant. In my opinion the order of Waller, J., restraining the Official Referee from proceeding as per the direction in clause (16) of Kumaraswami Sastri, J.'s decree is without jurisdiction so far as the half share of the son is concerned. No doubt it can be justified so far as the father's half is concerned and as we have directed

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that it may be paid to the Official Assignee there is no need for any stay of further proceedings before the Official Referee so far as they relate to the son's half. We therefore direct the Official Referee to proceed with the taking of accounts as directed in clause (16) of Kumaraswami Sastri, J.'s decree and send up his report to the Court so that the Court may distribute the sums to the various creditors.

The costs of the creditors, respondents (in both Courts) will be paid out of the fund in Court belonging to the 1st plaintiff.

The Official Assignee will be entitled to take his costs out of the estate.

We make no order as to costs on the Memorandum of Objections as between party and party.

Cornish, J.

Cornish, J.—I agree.

I think that the Official Assignee's claim to the whole of the fund paid into Court by the Receiver appointed in the partition suit is not sustainable. The effect of the son's severance of the joint status prior to his father's insolvency was that the father's power, which on his insolvency vests in the Official Assignee, to sell the son's interest in the family property in liquidation of the father's debts, no longer existed. The partition suit put an end to it. The Official Assignee, therefore, has no right whatever to the son's share. He can only proceed against the debtors of the insolvent; and the fact that the Hindu Law imposes on the son a liability for his father's debts does not make him in any way a debtor of the insolvent father. Half of the fund paid into Court, which represents the insolvent father's share, is all that the Official Assignee can be entitled to, out of that fund. Turning to the other appeal, O. S. A. No. 30, there is no doubt that if the appellant (who was the 5th defendant in the partition suit, C. S. No. 83 of 1927) could enforce against the insolvent the agreement to execute a mortgage, the agreement would likewise be enforceable against the Official Assignee, provided that the agreement was unimpeachable under the insolvency law. But Waller, J. has come to the conclusion, which appears to me to be entirely warranted by the evidence of the documents themselves, that the agreement though it purports to have been executed on 5th November, 1926, was in reality brought into existence on 9th March, 1927, when the second pronote

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for Rs. 2,000 was executed by the insolvent in the appellant's favour, that is to say, on a date between the presentation of the insolvency petition and the adjudication. Section 57, Presidency Towns Insolvency Act, protects any contract with the insolvent for valuable consideration, provided that such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of an insolvency petition against the debtor. The appellant must have known of the ante-dating of the agreement; and its purpose was obviously to defeat the insolvency law, and it is consequently not protected by S. 57 as a *bona fide* transaction. It follows that specific performance of it cannot be enforced against the Official Assignee. But it has been argued that the validity of the agreement is *res judicata* by the judgment in C. S. No. 83 of 1927, and that it is not competent for us to consider the question. All that was decided in that suit with reference to the agreement was that the stipulated rate of 22½ per cent. interest was an exorbitant rate to charge where the money-lender professed to have security for his loan. But the Court did not determine whether the security was enforceable. In fact, Kumaraswami Sastri, J., by referring the appellant to a suit for specific performance, seems to me to have expressly abstained from deciding that question.

The question that remains is whether the appellant is entitled by virtue of the power-of-attorney to stand in the position of a secured creditor in respect of his loan to the insolvent. In order to rank as a secured creditor the appellant must be a mortgagee, or have a charge, or a lien. The power-of-attorney being unregistered would be ineffectual to create a charge on the property, even if it purported to do so, which I do not think it did; and I do not see how the appellant can be regarded as having a lien in respect of the property. The power-of-attorney in his favour is limited to two things: to collect the rent from the present tenants and, in the event of a vacancy, to let the premises to some other tenant or tenants in the name of the insolvent and to collect the rent from those tenants. By a letter of the same date the insolvent authorised the appellant to appropriate the rents so collected towards the interest due on the loan, and he undertook not to cancel the power-of-attorney till the debt was discharged. The learned

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counsel for appellant has contended that his client has possession of the property under an irrevocable power, and he has referred to a passage in Coote on Mortgages, page 61, where it is stated that a power-of-attorney authorising a party to take possession of land is a contract to charge and is not revoked by the death of the principal, or, as here, by his insolvency. But the power in favour of the appellant is limited to receiving the rent from the tenants when such rent becomes payable. It does not authorise him to take possession of the houses. The power-of-attorney cannot be regarded as a contract to charge the houses. There seems to me, therefore, no ground for holding the power-of-attorney to be irrevocable. A power-of-attorney must, as a general rule, be treated as revoked by the insolvency of the donor of the power as against the trustee under a subsequent bankruptcy: See Williams on Bankruptcy, 13th Edition, page 321. In my opinion, the appellant is entitled to rank only as an unsecured creditor in respect of his pronote debt.

K. C. *Decree modified.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR DINSHAH MULLA.

Gafur Mohammad .. *Appellant**

v.

Mohammad Sharif and others .. *Respondents.*

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Indian Contract Act (IX of 1872), S. 16, sub-sec. (3)—Undue influence—Party to a contract "in a position to dominate the will of" the other—Onus probandi.

When it is sought to set aside a contract on the ground of undue influence, the *initial* onus is on the party seeking relief to establish that the other party to the contract was "in a position to dominate" his will. Until it has been so established, the burden does not lie upon the other party, under sub-sec. (3) of S. 16 of the Contract Act, of proving that the contract was not induced by undue influence.

Judgment of the Judicial Commissioners, Central Provinces, reversed.

Appeal No. 89 of 1931 by special leave from a decree of the Court of the Judicial Commissioner, Central Provinces, dated the 22nd November, 1927, which reversed a decree of

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*P. C. Appeal No. 89 of 1931. 10th May, 1932

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the Subordinate Judge of Balaghat, dated the 28th September, 1925, and decreed the plaintiffs-respondents' claim.

The question for determination on the appeal was whether a lease, dated the 2nd November, 1916, was obtained by undue influence exercised on the plaintiffs-respondents by the defendant-appellant.

Dunne, K. C. (with *Wallach*) for appellant.

The respondents did not appear at the hearing.

10th May, 1932. Their Lordships' judgment was delivered by

Lord Blanesburgh

LORD BLANESBURGH.—This is the defendant's appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, of date the 22nd November, 1927, decreeing the plaintiffs' suit against him, and reversing a decree of the 28th September, 1925, of the Subordinate Judge at Balaghat who had dismissed it. The plaintiffs although served did not appear before the Board.

The object of the proceedings was to obtain a decree, such as has been made by the Court of the Judicial Commissioner, setting aside a *lakh* and *parsadi* lease of the mauza Saheki in the District Balaghat granted to the appellant on the 2nd November, 1916. Of that mauza Saheki, Mohammad Kasam, father of the respondents, had been up to his death the owner. It was his self-acquired property. By his will of the 9th December, 1915, made a few days before he died, Mohammad Kasam bequeathed Saheki in shares to his sons—the three respondents, and a fourth son Hasam, since dead, and he appointed his eldest son, the respondent Sharif, to be guardian of his (Sharif's) three younger brothers all then infants. The financial position of the testator at the time of his death has been a subject of discussion in the Courts in India. He himself apparently regarded it unfavourably. "At present," he says in his will, "I have no cash or grain in balance, but I have to repay debts to the creditors amounting to rupees two thousand." He died six days later, on the 15th December, 1915, survived by his four sons, some daughters, his widow Musammat Masumbi, mother of Sharif and Hasam, and his widow Musammat Ladli Begam, mother of the respondents Kadar and Latif. There are to be found in the record traces of some rivalry between widow Masumbi and her sons on the one

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hand and widow Ladli Begam and her sons on the other. In that connection it is not perhaps irrelevant to note that both of the testator's widows and all of his sons were parties to the lease sought to be impeached.

On the application of Sharif and his three minor brothers on the 7th January, 1916, mutation of names in their favour was effected and by Tahsildar's order of the 22nd March, 1916, Sharif was appointed Sub-Lambardar of the mauza *vice* his father. It may be observed in passing that plainly Sharif then represented himself to be and was regarded as being adult.

In that state of the title to Saheki the lease of the 2nd November, 1916, was granted. To its terms attention must presently be directed. But before that is done it will be convenient to ascertain the relation in which it stands to an earlier registered *lakh* and *parsadi* lease of the same Saheki which on the 26th May, 1905, had been granted by the testator to one Birakhbhan.

That lease for which, incidentally, Rs. 1,500 was given, was for a term of 22 years, expiring on the 6th May, 1927, and was therefore current at the testator's death and for 11½ years thereafter. The lease of the 2nd November, 1916, opens with a reference to this earlier lease of 1905, averring that by it the *lakh* and *parsadi* of the culturable and Khudkasht land of Saheki had not been given. On that narrative it proceeds to grant to the appellant for a term expiring on the 2nd November, 1966, a *lakh* and *parsadi* term in Saheki as to the trees on the culturable and Khudkasht lands commencing from its date, and as to the trees upon the rest of the area from the expiry of the term therein granted by the lease of 1905. Now, a comparison of the two leases leaves it more than doubtful whether the initial assertion in the lease of 1916 is correct. On examination it appears that the area expressed to be covered by the earlier lease was not less than but was in effect the same as that expressed to be covered by the later lease; 1,245·74 bighas in the 1905 lease; 1,246 bighas in that of 1916; while the *jama* for which the area comprised in the demise is held is in each lease stated to be Rs. 400. The conclusion induced by reason of the areas included being in fact the same, that the lease of 1916 was in its totality reversionary is borne out first

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by the fact that it is so alleged in the respondents' plaint, and reiterated in their reply; next, by the fact that in both Courts below it was apparently so assumed; while nowhere in the record is there any trace that the appellant had so far ever been in possession or enjoyment of anything under his lease. This last circumstance, of course, may be attributable to the possibility that the trees on the culturable and Khudkasht lands of Saheki were not separately worth tapping. But taken in conjunction with the other matters just referred to and in particular with the respondents' own assertion on the subject, their Lordships feel justified in also adopting the assumption on which both Courts proceeded that the lease of 1916 was entirely reversionary expectant on the expiration of that of 1905.

The grantors of the lease of 1916 were, as has been said, the respondent Sharif, his three brothers and the testator's two widows. On its face Sharif is once more treated as adult, and his three brothers, acting through him as their guardian, are stated to be aged 9 years, 8 years and 7 years respectively. The lease, in view of the real facts as above stated, is a curious piece of conveyancing: the lessors are treated as having been the grantors of the 1905 lease: as being the persons who had become indebted: as if, in fact, the testator had never been connected with the property at all. The consideration for the lease was Rs. 4,000. Rs. 2,000 were retained by the appellant to pay with interest four named creditors of the lessors to that amount. Rs. 1,000 is expressed to have been paid to the lessors, and the remaining Rs. 1,000 was to be paid to them within three months. Although all this was so expressed in the lease it seems to have been common ground at the trial that the debts for Rs. 2,000 were the testator's debts of that amount mentioned in his will, while the other payments were in fact made to and received by Sharif. The record contains receipts for advances by the appellant to Sharif, subsequently made from time to time, with particulars of a suit brought by him to recover these advances, and finally of a decree against Sharif for Rs. 7,920, of the 16th April, 1924. On the 17th July, 1924, three months after that decree, but seven and a half years after the lease of 1916, the action to set that lease aside, out of which this appeal arises, was commenced. It need hardly be said that this sequence of events has not been lost sight of by the

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appellant. The two widows with Hasam were by this time dead. The interest of Hasam had on his death passed to one or other of the respondents, who as the remaining grantors of the lease, were plaintiffs—Kadar, with his age strangely enough given as 14, and Latif, with his age even more strangely given as 8, each suing by a so-called "guardian brother," Rahimdadkhan.

The plaint, after correctly stating the title of the plaintiffs and the grant of the lease of the 2nd November, 1916 (describing it as already stated as a lease in all respects reversionary), by paragraph 6 alleges that the plaintiff Sharif was born on the 6th September, 1899, that at the date of the lease he was still a minor about 17 years of age; that being a minor he could not under any circumstances act as guardian of his two co-plaintiffs and Hasam and that the contract was void according to law; that even if Sharif was then major he was not the lawful guardian of his younger brothers whose rights could not be affected by the contract.

By paragraph 7 it is further alleged that the appellant obtained the lease for many years and for very little price by taking advantage of the tender age of Sharif and by putting pressure on him; that there was no necessity for giving the lease because the debts of the testator could have been satisfied out of the considerable income of the mauza; that the three younger brothers of Sharif had obtained no benefit from the lease and it could not affect their rights. In the respondents' oral pleading the undue influence alleged was said to be due to the fact that the appellant was able to dominate the will of Sharif as he was a distant relative and Sharif was a boy of tender age; that he took undue advantage of that position and exercised undue influence. On these allegations the claim was that if Sharif were a minor at its date the lease should be set aside on repayment of Rs. 2,000; that whether he were major or minor it should be set aside as against his younger brothers. Separately if Sharif was major, the lease should be cancelled on the ground of undue influence.

The respondents' case at the trial was mainly based on the allegation that Sharif was minor at the date of the lease. Witness after witness was called to depose to this. The allegation was found by both Courts to be false. Some evidence

was directed to the allegation of inadequate consideration but there was no evidence of undue influence then adduced. Sharif was not even a witness on his own behalf. He was at the close produced for cross-examination by the appellant. And his evidence was quite unequivocal. His conduct throughout had been blameless. He was no gambler, he said, whatever debt he incurred, he incurred it for joint family purposes. The most he would say about undue influence was that he had signed the lease at the instance of the appellant. But he had never reported to the police that any pressure was brought to bear upon him, and he did not even then say so. By the appellant the suggestion of undue influence was in evidence repudiated. Distantly related to the respondents' family he had throughout acted with generosity towards both them and Sharif.

And there was no evidence to the contrary of all this. And here it may be noted that although the plaint seeks to distinguish in some aspects of it the case of Sharif from that of his co-plaintiffs, no attempt was made at the trial to make that position good by evidence. At the trial all the plaintiffs made common cause, and after a prolonged hearing the learned Subordinate Judge arrived at conclusions which in effect are thus summarised by the learned Judicial Commissioners.

(*a*) That Sharif's age was approximately 22 when the lease in suit was executed;

(*b*) That the appellant was not then in a position to dominate the will of Sharif;

(*c*) That the consideration was adequate and that the transaction was a fair one into which undue influence did not enter;

(*d*) That Sharif was appointed guardian to his minor brothers under the will of the testator and duly executed the lease in this capacity being *de facto* guardian and manager as well; and

(*e*) That the lease was given for purposes beneficial to the family and that the appellant had made due inquiry before entering into it.

Their Lordships associate themselves with these findings. A perusal of the record shows that they were each of them fully warranted by the evidence or by the lack of evidence which the learned Judge had to take into account. For

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example, upon the question of Sharif's age at the date of the lease, the evidence is overwhelming to establish that his allegation of infancy at that date (the respondents' main contention at the trial and later in the Court of the Judicial Commissioner) was entirely false. The learned Subordinate Judge, having seen Sharif, notes that in appearance he was much older than he represented himself to be. But his irresistible conclusion to the same effect resulted from authentic documents and proved transactions. The testator in his will of 1915 treated Sharif as then adult; in the mutation proceedings of 1916, as already stated, he held out himself as adult. In evidence he admitted that as early as 1914 he was acting as agent of his mother, and that in February, 1916, he engaged a pleader and executed a power in his favour. In 1915, in a revenue case he is found stating on affirmation that he was then 23; in a statement recorded in 1917 he gave his age as 24; in December, 1923, he is found in a revenue case giving his age as 30. The learned Subordinate Judge is well justified in his statement that this allegation of infancy at the date of the lease was not *bona fide* made. To their Lordships it seems to disclose almost incredible effrontery. But for this, its striking characteristic, they would not have troubled with it, for the Court on appeal agreed as will be seen with the finding on this point, so that it is now concurrent. But the baselessness of the allegation upon which so much was made to depend throws upon the whole claim a sinister light instructing caution in dealing with the other issues raised by the respondents which, if their Lordships may so far anticipate, was absent from the judgment of the Judicial Commissioners.

With regard to findings (*b*) and (*c*) there was no evidence adduced to support the contrary view that the appellant was at the date of the lease in a position to dominate the will of Sharif. He did not even in his own evidence at the trial suggest that he had been the victim of any undue influence whatever. Finding (*d*) has not since been adversely criticised, and may be passed over now. But some comment may here be conveniently made on findings (*c*) and (*e*). While there was evidence which in their Lordships' view fully justified these findings, they are more open to criticism than are the others.

First of all it may be conceded that the lease of 1916 bears on its face the appearance of a highly speculative transaction—

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it is the disposition of the entire revenue derivable from *lakh* from the mauza over the long term of 40 years, expiring 50 years thence, and all for a payment of Rs. 4,000 down. But this *prima facie* impression does not survive an examination of the circumstances surrounding the lease. The testator himself has in his will placed on record the position of his estate at the time of his death. A year later the debts for Rs. 2,000 were still unpaid, and they were carrying interest. Other payments were maturing, while the respondents are content to leave, as being completely justified, the Rs. 25,000 debt which Sharif, administering the estate, has incurred.

Again, the fact that the whole payment for the lease was made in one initial sum was apparently in no way unusual. That was an incident of the lease of 1905 granted by the testator himself, and is characteristic of similar leases referred to by witnesses at the trial. Next the consideration seems in no respect to have been inadequate. Perhaps little importance is to be placed on the fact that the declared annual value—Rs. 80—of the *lakh* was small. But, even if the fact that the appellant derived no benefit from the lease until 10 years had elapsed be also ignored, the Rs. 4,000 for this lease represented a much larger payment proportionately than that obtained by the testator himself for the lease of 1905. Again, by the course adopted, Rs. 4,000 was obtained without for 10 years any loss of revenue to the lessors, and merely by a continuance after that date of a position which, initiated by the testator, would then have been existent for 27 years. It seems, however, that the most serious criticism levelled against the lease is that it was made when the price of *lakh* was rising and that during the years of the war it had risen to Rs. 100 per maund in place of from Rs. 15 to Rs. 20 its price at the date of the lease. It is, however, not clearly emphasised in these criticisms that no benefit accrued to the appellant from this rise in price. It is not remembered that it was to the lessee under the lease of 1905 that it accrued exclusively. Nothing has been said as to the value of *lakh* in and since 1927. It will be surprising if it has not shared the fate, in the matter of price, of nearly all other commodities. But if once the lease of 1916 can be justified as at its date—and it has been so justified—these fluctuations in value, whether up or down, appear to their Lordships to have small bearing on the present issue. Moreover, the Board would

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point out that except in its relevance in a remote sense to the case of undue influence the question of the adequacy of the payment made by the appellant for the lease cannot affect its validity in his hands. This, as it has developed, is not an action by the infant respondents against Sharif to make him responsible for mal-administration of their affairs. It is an action in which they are all making common cause as lessors to set aside a lease of which they are all equally free or by which they are all equally bound. Their Lordships would also point out that until it has been established that the appellant was "in a position to dominate the will of" Sharif, no assistance on the issue of undue influence is available to the respondents from section 16 (3) of the Indian Contract Act. That issue in other words, remains with its burden of proof on them. The burden must be discharged if the issue is to be found in their favour. It will be seen in a moment that these last two considerations become of importance when the course of the case in the Court of the Judicial Commissioner comes to be dealt with, as their Lordships now proceed to do.

The learned Subordinate Judge, upon his findings, dismissed the suit, and the respondents, the plaintiffs, appealed.

The judgment of the Court on appeal was delivered by the Judicial Commissioner and the Assistant Judicial Commissioner on the 22nd November, 1927. As already stated, these learned Judges were in agreement with the Subordinate Judge on the question of Sharif's age, but that finding introduced no reserve in their treatment of the other issues of the case, all of which were stressed strongly against the appellant—so strongly indeed that while setting aside the lease and ordering the return to the appellant of the Rs, 4,000 which he had paid 7½ years before, the learned Judges saw no reason for allowing him any interest thereon, although he in the interval had had no benefit whatever from the demise.

The learned Judges begin their judgment by observations on the testator's lease of 1905 which seems to indicate that in their view it was more and not less favourable to the estate than the lease of 1916. The following later passages in their judgment explain themselves.

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The appellant "admits that he has been making money by taking *lakh* contracts and he must be assumed to be a man with so to speak expert knowledge of the *lakh* market. At the time the lease was taken the price of the *lakh* was on the up grade. . . . The transaction on the very face of it from its own internal evidence was obviously a catching bargain of a typical kind. Mohammad Sharif must at the time have been an utterly inexperienced lad and there has been no proof whatever of any pressure on the estate to justify the first plaintiff entering into the extraordinary transaction he did on the date in question. It is true that his father left a debt of some Rs. 2,000 but the family property was quite a valuable one and it is almost impossible to suppose that arrangements less disastrous to the future of the family property could not have been made for paying off the debt in question . . . That it was the beginning of the downward path for Mohammad Sharif in his management of his estate, is also evidenced by the fact that he has since borrowed Rs. 6,000 more from the same defendant-respondent . . . evidence shows that in 1925 the estate had been mortgaged for Rs. 25,000 more, this mortgage having apparently been executed partly in order to pay off a decree of the present defendant-respondent who had attached the village share . . . Proof of undue influence, like proof of fraud, cannot ordinarily be obtained by direct evidence. It must be essentially a matter of inference . . . When we take into account the fact that Gafoor Mohammad is an elderly man and a relation of the youthful plaintiffs and that he is, so to speak, admittedly an expert in *lakh* contract work, the inevitable conclusion arises that this was a catching bargain of a very pronounced type, and the circumstances, in our opinion, lead to the irrefragable conclusion that the lease in question was one executed as a result of undue influence brought to bear on the first plaintiff by the defendant-respondent . . . the lease in question must be held to be void . . . the plaintiffs must refund the total consideration of Rs. 4,000 received by them, but we see no reason to allow interest on this amount."

The answer which their Lordships would make is to be found in the earlier portion of this judgment. Summarised, it is that the conclusions of the learned Judges where they are not directly opposed to the evidence are in no way supported by it. Their conclusions are based on mere conjecture with counter-

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vailing considerations ignored; such a method of reasoning is not judicially permissible. Their Lordships, upon the actual evidence in the cause, are far from suggesting that the judgment and conclusions of the learned Judges could be supported, even if, under section 16 (3) of the Indian Contract Act, the burden of showing that the lease of 1916 had not been induced by undue influence lay upon the appellant. They are clear, however, that with the burden of the affirmative resting upon the respondents, the judgment cannot stand.

Their Lordships accordingly are of opinion that the appeal should be allowed, the decree of the Court of the Judicial Commissioner being discharged, and that of the Subordinate Judge restored.

And they will humbly advise His Majesty accordingly.

The respondents must pay to the appellant his costs of their appeal to the Court of the Judicial Commissioner and the costs of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Respondents *ex parte.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD RUSSELL OF KILLOWEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Maung Sein Done .. *Appellant**

v.

Ma Pan Nyun and others .. *Respondents.*

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Civil Procedure Code (1908), *S.* 11 *not exhaustive*—Res judicata *as between co-defendants—Second suit brought by a party who was a* pro forma *defendant in a previous administration suit, when barred by the doctrine of* res judicata.

The statement of the doctrine of *res judicata* contained in S. 11 of the Civil Procedure Code, 1908, is not exhaustive.

In applying the rule of *res judicata* as between co-defendants, three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. Where these conditions are established, the rule of *res judicata* applies, even though no relief had been granted to the plaintiff in the previous suit, but on the contrary, as a result of the adjudication upon the issues involved therein, the suit had been dis-

* P. C. Appeal No. 7 of 1931. 12th April, 1932.

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dismissed. *Cottingham* v. *Earl of Shrewsbury*, (1843) 3 Hare 627 at p. 638, per Wigram, V. C., and *Munni Bibi* v. *Tirloki Nath*, (1931) L. R. 58 Ind. App. 158: I. L. R. 53 A. 103: 61 M. L. J. 196 (P. C.), followed.

In a suit for the administration of her mother's estate, brought by one Ma Sein against her two brothers, her sister (Ma Pan Nyun) was impleaded as a *pro forma* defendant and supported the then plaintiff's claim. The suit was dismissed upon the grounds that the Chinese Customary Law applied to the succession to the mother's property and that under that law daughters were excluded from inheritance. *Held*, that a subsequent suit instituted by Ma Pan Nyun making a claim similar to that which her sister (Ma Sein) had made in the earlier suit, was barred by the doctrine of *res judicata*.

Judgment of the High Court, Rangoon, reported as *Ma Pan Nyun* v. *Maung Sit Phaung*, (1928) I. L. R. 6 Rang. 575, reversed.

Appeals No. 7 of 1931 from two judgments of the High Court, Rangoon, dated the 7th June, 1928 and 1st April, 1930, delivered on appeals from the judgments of the District Judge of Pyapon, dated the 24th November, 1927 and 10th December, 1928.

The material facts of the case are fully set out in their Lordships' judgment.

There had been previous litigation between the parties, which culminated in a judgment of the High Court reported in *Ma Sein* v. *Ma Pan Nyun*.[1] In the present suit, the High Court on the 7th June, 1928, overruled the defendant's plea of *res judicata* and remanded the case to the District Judge for trial on the merits. Vide *Ma Pan Nyun* v. *Maung Sit Phaung*.[2]

The question at issue between the parties was, whether sons alone take under the Chinese Customary Law or whether daughters are entitled to share under the Indian Succession Act, 1925, or the Burmese Buddhist Law. The Courts in India decreed the plaintiff's (daughter's) claim for a one-fourth share of her mother's estate. The learned Judges of the High Court observed that they were bound by the authority of the recent Full Bench decision in *Phan Tiyok* v. *Lim Kyin Kauk*[3] to hold that the plaintiff was an heir of her mother, whether the mother was a Burmese Buddhist, as the plaintiff alleged, or a Chinese Buddhist or Confucian, as the defendant alleged, and that her (the plaintiff's) share, whether under the Burmese Buddhist Law or under the Indian Succession Act, 1925, would be the same, namely, one-fourth. The judgment of the High Court on the merits is reported in *Maung Sein Done* v. *Ma Pan Nyun*.[4]

Against the judgments of the High Court, both on the preliminary issue of *res judicata* and on the merits, the defendant appealed to His Majesty in Council.

Dunne, K. C. and *R. W. Leach* for appellant.

A. Pennell for 1st respondent (plaintiff).

1. (1924) I. L. R. 2 Rang. 94. 2. (1928) I. L. R. 6 Rang. 575.
3. (1930) I. L. R. 8 Rang. 57 (F.B.) 4. (1930) 127 I. C. 378.

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12th April, 1932. Their Lordships' judgment was delivered by

LORD RUSSELL OF KILLOWEN.—In this appeal their Lordships find it unnecessary to decide upon the merits of the case as in their opinion the plea of *res judicata* must prevail. In order, however, to explain how the plea arises, it is necessary to relate the facts in some detail.

The four parties to this appeal are two sons and two daughters of Chan Sit Shan and Ma Myit, his wife. Chan Sit Shan had three other children born of this wife, two of whom died before their father; the third died in 1903.

Chan Sit Shan was a Chinaman, who was born in China and settled in Pyapon, Burma. There he married Ma Myit, a native of Pyapon, who before her marriage was a Burmese Buddhist. At some time, Chan Sit Shan went back to China and there married a second wife, a Chinawoman, named Ma Kee Ya. He returned to Burma with this second wife and a Chinese boy named Pwin Lit whom they had adopted. Subsequently his wife, Ma Kee Ya, bore him a daughter, who was named Ma Kyin Myaing.

Chan Sit Shan died in 1902 intestate. On his death, there was a division of property between his two families as a result of which no further claim has arisen from or on behalf of Ma Kee Ya, Pwin Lit, and Ma Kyin Myaing, or any of them.

When Chan Sit Shan died, the eldest of his five surviving children, offspring of Ma Myit, was only about 15 or 16 years old. Their mother took possession of and managed the property which had not, on the division, gone to the other family, and she seems to have remained in possession and management until her death, which took place on the 22nd January, 1918.

She was survived by her two sons, the respondent Maung Sit Paung, and the appellant, Maung Sein Done, and her two daughters, the respondents, Ma Pan Nyun and Ma Sein. On her death her two sons took possession.

Thereupon one of the daughters instituted legal proceedings, the nature and course of which require consideration, inasmuch as these are the earlier proceedings upon which the defence to the present suit of *res judicata* is founded.

The suit was instituted in the District Court of Pyapon, the parties being Ma Sein, plaintiff, and her sister and two brothers defendants. The plaint is dated the 21st December,

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1918. By it the plaintiff alleges that Ma Myit, a Burmese Buddhist, died intestate possessed of considerable moveable and immoveable properties, set out in an annexed schedule; that she left as her heirs and representatives under Burmese Buddhist law, her children, the plaintiff and the defendants; that the two sons had taken possession of her property without taking out letters of administration; that the plaintiff, as a daughter, was entitled to an equal fourth share in the estate and effects of the deceased; and that Ma Pan Nyun was also an heir and was joined as a formal defendant. The relief claimed included administration of the estate of Ma Myit, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of her estate.

The two sons put in a joint written statement. By it they denied that Ma Myit left any property at her death, and alleged that the property in suit represented the natural growth and increase of Chan Sit Shan's property which, after his death, had been managed by Ma Myit. As to both Chan Sit Shan's property and the property (if any) owned by Ma Myit, the two sons by their written statement further alleged (1) that the succession thereto was governed by Chinese customary law and not by Burmese Buddhist law, because Chan Sit Shan was a Chinaman and Ma Myit had become a Chinawoman and had died a Chinese widow; and (2) that by Chinese customary law (females being excluded by that law in the presence of male issue), the plaintiff had no right to inherit from either parent, and that her suit was therefore not maintainable.

The daughter, Ma Pan Nyun, filed no written statement, but she gave evidence, at the hearing, on behalf of the plaintiff, and in support of her claim.

The suit was tried by a Burmese Judge, the issues including (amongst others) the following :—

"1. Was Ma Myit a Burman Buddhist at the time of her death?

"4. Is the plaintiff entitled to inherit the estate of Ma Myit? If so, to what extent?

"7. Are the parties legitimate children of Chan Sit Shan and Ma Myit and, if so, what law of succession should be applied?

"8. What relief is the plaintiff entitled to?"

The judge delivered judgment on the 18th February, 1921. After a detailed examination of the evidence he answered the first issue in the negative. He decided that she was a Chinese Buddhist at her death. The fourth issue he answered in the

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negative. His finding in regard to the seventh issue was that as both Chan Sit Shan and Ma Myit were Chinese Buddhists the Chinese customary law must be applied to them. Upon the eighth issue he said: "As I have held that Ma Myit was not a Burman Buddhist, the plaintiff is not entitled to a fourth share in her estate." He dismissed the suit with costs.

Ma Sein appealed to the High Court of Judicature at Rangoon upon the ground that Ma Myit was a Burmese Buddhist and that therefore Ma Sein was one of her heirs. The appeal was dismissed on the 21st January, 1924, upon the grounds (1) that upon the facts of the case Chinese customary law governed the succession to the property (if any) left by Ma Myit and (2) that under that law her sons and not her daughters would inherit.[1]

Thus a suit to administer the estate of Ma Myit, to which Ma Pan Nyun was a necessary and proper party if she had any interest in her mother's estate, was dismissed upon the grounds that Chinese customary law applied to the succession to Ma Myit's property and that under that law no female could inherit in the presence of male issue.

The suit which has given rise to the present appeal was instituted on the 23rd July, 1927, in the District Court of Pyapon. The plaintiff is the daughter of Ma Pan Nyun; the defendants are the two sons and the other daughter who had been the plaintiff in the former suit. The plaint is, with the necessary alterations, substantially the same as the plaint in that suit. The relief sought is establishment of the plaintiff's right to a one-fourth share in Ma Myit's estate, and administration of that estate, the claim to that relief being based upon the allegation that Ma Myit died a Burman Buddhist leaving as her heirs her two sons and her two daughters. The defendant Maung Sein Done (who is the appellant before their Lordships' Board) filed a written statement in August, 1927, dealing briefly with the claim on the merits, but raising also the plea that the plaintiff's claim was " barred by *res judicata* " by reason of the previous litigation and the judgments and decrees therein. The other defendants did not defend.

A preliminary issue was tried, viz., " Is the suit barred by the doctrine of *res judicata* ? " The District Judge delivered

1. The judgment is reported in *Ma Sein* v. *Ma Pan Nyun*, (1924) I. L. R. 2 Rang. 94.—K. J. R.

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his judgment on the 24th November, 1927, answering the issue in the negative, and stating as his reason, without entering into particulars, that "all the conditions requisite for *res judicata* between parties who were co-defendants in a former suit, are not present in this case." He, however, dismissed the suit upon the ground that the High Court's ruling in the previous case was binding upon him, viz., that Ma Myit could have no share according to Chinese customary law in the estate of her deceased husband, and that since the plaintiff before him claimed through Ma Myit, she could have no better claim than Ma Myit. It seems to have been overlooked by the Judge that Ma Pan Nyun's action related to her mother's estate and not to her father's estate. By his decree, dated the 24th November, 1927, it was ordered that the suit be dismissed with certain provisions as to costs.

Upon appeal (No. 9 of 1928) to the High Court the order of the District Judge was on the 7th June, 1928, set aside, and the case was returned to the District Court to be disposed of on the merits. The Judges on appeal treated the judgment of the District Judge as founded on the view that the plaintiff could have no cause of action because a Bench of the High Court had ruled that her mother, Ma Myit, was a Chinese Buddhist and that ruling was binding upon him. If that was in truth the foundation of the decision it was obviously wrong ; for unless the matter were *res judicata*, it would be open to the plaintiff upon sufficient evidence to obtain a different decision. Upon the question of *res judicata* the Judges on appeal thought that the case did not fall within S. 11 of the Code of Civil Procedure, 1908, because there was in the former suit "no active contest as to rights and no decision thereon as between Ma Pan Nyun and her co-defendants." By their decree, dated the 7th June, 1928, it was ordered[1] that the decree of the 24th November, 1927, be set aside, that the case be returned to the District Court for disposal on the merits, and that the costs do follow the event.

The suit was ultimately tried on the merits, with the result that on the 10th December, 1928, a decree was made ordering accounts to be taken of Ma Myit's estate from the date of her

1. See *Ma Pan Nyun* v. *Maung Sit Phaung.* (1928) I. L. R. 6 Rang. 575, decided by Doyle and Das, JJ. The Report erroneously attributes the judgment to Das, J., alone.—K. J. R.

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death to the date of the decree. Upon appeal (No. 296 of 1928) to the High Court a decree (dated the 1st April, 1930) was made confirming the decree of the 10th December, 1928, and containing certain provisions as to costs.

If, however, the plea of *res judicata* affords a decisive answer to the claim of Ma Pan Nyun, the trial should not have proceeded. Their Lordships accordingly do not propose to examine the evidence which was adduced, but proceed at once to consider whether the plaintiff is bound by what was decided in the earlier litigation.

It is unnecessary to consider whether the present case falls within the actual wording of S. 11 of the Code. It is well settled that the statement of the doctrine of *res judicata* contained therein is not exhaustive, and that recourse may properly be had to decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine.

The well-known statement of Wigram, V.C. in *Cottingham* v. *Earl of Shrewsbury*[1] may, their Lordships think, properly be cited in reference to the present case, viz. : "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

Further, in a recent case, Sir George Lowndes, in delivering the judgment of this Board, stated what was required in applying the rule of *res judicata* as between co-defendants in the following language:—"In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided." (See *Munni Bibi* v. *Tirloki Nath*[2].)

Their Lordships now turn to a consideration of the first litigation.

1. (1843) 3 Hare 626 at 638.

2. (1931) L. R. 58 I. A. 158 at 165: I. L. R. 53 A. 103: 61 M. L. J. 196 (P. C.)

P. C.
Maung Sein Done v. Ma Pan Nyun.
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The suit brought by Ma Sein was an administration suit, the purpose and object of which was to have the mother's estate divided among her four children as her heirs. To that suit all the alleged heirs were necessary and proper parties, for every one entitled to a share would be entitled to be heard upon the question whether or not an order for administration should be made. Further, no person who was not entitled to a share would be entitled to bring such a suit, or to have any voice upon the question of administration. From the outset, it was clear what was the issue to be decided. The plaintiff's only title to sue depended upon the answer to the question whether all the four children were heirs of the mother or whether only the sons were entitled to succeed to her property, and this, in turn, depended upon the answer to the question whether the succession to the mother's property was governed by Chinese customary law or by Burmese Buddhist law. In a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical; they were either both of them co-heirs with their brothers or neither of them was entitled to any share.

The matter which was adjudged was that the succession to Ma Myit's estate was governed by Chinese customary law, and that her daughters, therefore, were not entitled to any share therein. The language actually used in the Appellate Court was as follows[1] :—"I would hold that the Chinese customary law should be applied to her estate. Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was rightly dismissed." That is, in terms, a finding that neither Ma Sein nor Ma Pan Nyun was entitled to any share in the estate of Ma Myit.

It was urged that the doctrine of *res judicata* could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention. In Ma Sein's suit there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed. It was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenor had been the other way.

1. See *Ma Sein* v. *Ma Pan Nyun*, (1924) I. L. R. 2 Rang. 94 at 98 99.—K. J. R.

P. C.
Maung Sein Done v. Ma Pan Nyun
Lord Russell.

The issues involved in the present suit of Ma Pan Nyun are identical with the issues in the earlier suit; and their Lordships are of opinion that in regard to those issues (1) there was in the earlier suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (viz., whether she was entitled to any share in her mother's estate) was finally decided.

It follows, therefore, that the plea of *res judicata* raised in the present litigation ought to have been successful and the suit of Ma Pan Nyun ought, on that ground, to have been dismissed.

For these reasons their Lordships are of opinion that this appeal should be allowed. The decrees of the 7th June, 1928, the 10th December, 1928, and the 1st April, 1930, should be set aside and the decree of the 24th November, 1927, restored. In regard to costs, the respondent Ma Pan Nyun should pay to the appellant (1) his costs of the appeal No. 9 of 1928; (2) his costs of the suit incurred subsequently to the 7th June, 1928; (3) his costs of the appeal No. 296 of 1928; and (4) his costs of the appeal before their Lordships' Board. Any costs already paid by the appellant under any former decree in this litigation should be repaid to him by the person or persons to whom, under such decree, they were payable.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Cutler, Allingham and Ford.*

Solicitor for 1st respondent : *J. E. Lambert.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTAKRISHNA AIYAR.

The Rajah of Vizianagram .. *Petitioner* (Appellant in all the petitions)*

v.

The Government represented by the Government Pleader .. *Respondents in all (Respondents).*

The Rajah of Vizianagram *v.* The Government.

Court-Fees Act (VII of 1870), S. 17—"Distinct subjects"—Suit by landholder against ryots under S. 193, Madras Estates Land Act, 1908—Dismissal—Appeal—Court-fee payable.

A suit filed by a landholder against the ryots of a village under S. 193 of the Madras Estates Land Act does not comprise "*distinct subjects*" within the meaning of S. 17 of the Court-Fees Act. Where such a suit is dismissed and the landholder appeals, the court-fee payable is on the total of the annual rents of the immoveable property to which the suit relates and not on the aggregate of the court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with the provisions of S. 7 (*xi*) (*b*) of the Act.

Meaning of the expression "distinct subjects" discussed.

In re *Parameswara Pattar*, (1930) I. L. R. 54 Mad. 1 : 59 M. L. J. 469 (F.B.), relied on.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act and cl. 16 of the Letters Patent praying the High Court to revise the orders of the District Court of Vizagapatam, dated 4th March, 1930 and made in A. S. Nos. 94 of 1929, 214 of 1927, 236 of 1929, 320 of 1927, 419 of 1929, 473 of 1927 and 578 of 1929.

S. Venkatesa Aiyangar for petitioner.

The Government Pleader (P. Venkataramana Rao) for respondents.

The Court delivered the following

Anantakrishna Iyer, J.

JUDGMENT :—These revision petitions raise the question as regards the proper Court-fee payable in a suit filed by a landholder against the ryots under S. 193 of the Madras Estates Land Act for enhancement of rent. Each revision petition relates to a suit for enhancement of rent against the ryots of a particular village, and each of the seven revision petitions relates to each of the seven villages. The grounds for enhancement alleged in the plaints are the same. The suits having been dismissed, appeals were preferred by the landholder and the ques-

*C. R. Ps. Nos. 1764 to 1770 of 1930. 10th March, 1932.

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tion arose whether S. 17 of the Court-Fees Act applies to the case, and whether the Court-fee payable in respect of the appeal was the Court-fee payable on the total of the rents of the immoveable property to which the suit relates payable for the year next before the date of presenting the plaint (S. 7 (xi) (*b*) of the Court-Fees Act) or whether the Court-fee payable is the aggregate of the Court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with the provisions of S. 7 (xi) (*b*) of the Court-Fees Act. The learned District Judge held that though the practice with all the divisional officers of the District and in that District Court was to accept a Court-fee paid on the aggregate annual income sought to be enhanced, yet as I understand his order, having regard to the fact that each individual ryot has to pay his own individual rent that under S. 98 that a suit instituted under S. 193 may in certain circumstances be split up into separate suits for being tried separately, and that it was undeniable that separate causes of action constitute separate subjects within the meaning of S. 17 of the Court-Fees Act, the objection raised by the Court-fees examiners was correct, and directed the landholder—appellant—to pay the excess Court-fee calculated separately in respect of rent payable in relation to each holding included in the suit. The landholder has preferred these revision petitions—

The question turns on the construction of S. 17 of the Court-Fees Act which enacts.

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

Then the section proceeds to enact that, nothing in the section shall be deemed to affect the power conferred by the Code of Civil Procedure, S. 9, *i.e.*, S. 9 of Act VIII of 1859, corresponding to Order 1, rule 2 of the present Code of Civil Procedure, which enables the Court to order separate trials if that be found to be the more convenient course to follow. It should be noticed that the words used in S. 17 are *'two or more distinct subjects'* and not *'two or more distinct causes of action'*. The distinction is important, because in ***Ponnammal*** v. *Ramamirda Aiyar*[1] a Full Bench of this Court held that a

1. (1914) I. L. R. 38 Mad. 829 : 28 M. L. J. 127 (F.B.).

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claim for possession and a claim for mesne profits are separate causes of action, and separate suits are maintainable in respect of the same, and that the bar under Order II, rule 2, Civil Procedure Code, would not apply to such cases. That was a ruling on the Civil Procedure Code, Order II, rule 2.

Recently, a Full Bench of this Court in *Parameswara Pattar, In re*[1] had to consider the meaning of the words 'distinct subjects' in S. 17 of the Court-Fees Act, and, that in respect of a suit for possession of land and mesne profits. The Full Bench held that the Court-fees payable is on the aggregate value of both reliefs. The Full Bench observed at page 2 of the report as follows :—

"The word 'subjects' in this section is somewhat obscure in its meaning, and has been held in some decisions to be not capable of precise definition. Ordinarily, the right or title to the land is the basis for the claim for possession of the land, as also for mesne profits, and it cannot therefore be deemed that the two claims are so disconnected, without any inter-relation, as to form *distinct subjects*, under section 17 of the aforesaid Act."

Later on it was observed with reference to the argument based on *Ponnammal* v. *Ramamirda Aiyar*[2] as follows :—

"The question remains whether separate causes of action would invariably be the criterion for treating the claims based on them as distinct subjects, under section 17 of the Court-Fees Act. In the Full Bench case, *Kishori Lal Roy* v. *Sharut Chunder Mozumdar*[3] this does not appear to have been taken as the deciding test . . . The preponderance of authority is in favour of not treating these two claims as '*distinct subjects*' under section 17 of the Court-Fees Act. The Full Bench also remarked that as there was no definition of the word '*subject*' in the Court-Fees Act, one need not attempt to define it, but should only be guided by the long course of practice, and that any doubt or obscurity as to the precise meaning of the word 'subject' in section 17 should be cleared by the Legislature in due course."

The learned District Judge had not the benefit of this Full Bench decision which was delivered some weeks after his judgment in the present cases. S. 193 enacts that "a suit for enhancement may be instituted against any number of ryots collectively, provided (1) all such ryots are ryots of the same landholder, (2) that all the holdings in respect of which the suit is instituted are situate in the same village, and (3) that the grounds for enhancement are the same". Though S. 30 of the Act enables the landholder to sue for enhancement of rent

1. (1930) I. L. R. 54 Mad. 1 : 59 M. L. J. 469 (F.B.).
2. (1914) I. L. R. 38 Mad. 829 : 28 M. L. J. 127 (F.B.).
3. (1882) I. L. R. 8 Cal. 593 (F.B.).

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on various other grounds mentioned in that section, in case he should propose to file a single suit under S. 193 of the Act, he should restrict his rights so far as the suit is concerned and bring himself within the proviso to S. 193, which restricts his rights to sue for enhancement of rent in particular ways. In my opinion, having regard to the decision of the Full Bench in In re *Parameswar Pattar*,[1] it is not a sufficient answer in respect of the point now under consideration to say that the landholder could file separate suits against each of the ryots of the village for enhancement and that the causes of action in respect of each ryot are different. The question is whether the suit under S. 193 embraces *'distinct subjects'*. The suit is one for enhancement of rent on common grounds. It is not for enhancement of rent and for some other reliefs. It was mentioned that in the decision in In re *Parameswara Pattar*[1] the appellant only was represented and that neither the respondent nor the Government were represented and that notices had not been given to the Government pleader, but I am afraid that all that is no ground for my not being bound by the opinion of the Full Bench. The learned District Judge says that the practice all along was to accept a Court-fee paid on the aggregate annual income sought to be enhanced." The word 'subject' has not been defined, and it is, I think, not unreasonable to hold that a suit under S. 193 does not comprise *'distinct subjects'* and that the suit of the landholder to enhance the rent upon the particular conditions mentioned in that section which should all exist before a suit under that section could be instituted, does not embrace *'distinct subjects'* within the meaning of S. 17 of the Court-Fees Act.

If there is any doubt on the matter, being a taxing statute, the subject is entitled to the benefit of the doubt arising on the words of the taxing statute. I do not propose to go into the several decisions cited before me which refer to causes of action and suits based on different causes of action, since after the decision of the Full Bench in In re *Parameswara Pattar*,[1] those considerations are not conclusive in considering whether a particular suit embraces 'distinct subjects' within the meaning of S. 17 of the Court-Fees Act.

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1. (1930) I. L. R. 54 Mad. 1 : 59 M. L. J. 469 (F.B.).

I may note here that under the powers conferred by S. 198, the Collector did not order separate trials as against each of the ryots in this particular case.

On the whole, I have come to the conclusion that the Court-fee originally paid on the appeals was correct and that the order of the learned District Judge directing payment of additional Court-fee by the appellant in the District Court should be set aside. In the peculiar circumstances, I make no orders as to costs of these revision petitions.

B. V. V. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Vadde Venkataswami and another .. *Appellants** (*Defts. Nos.* 11 *and* 12)

v.

Bommaraju Venkata Subbayya and others. *Respondents* (*Plff. and Defts. Nos.* 42 *to* 45, 2, 3, 4, 5, 6, 8, 9, 10 *and L. R. of* 1*st Deft.*).

Fraud—Fraud on registration law—Suit by vendor to avoid deed—Maintainability—"In pari delicto potiorest conditio possidentis."

As a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the suit or even in the hearing of an appeal. This rule is applicable even though there has been a fraud against a statute.

Where under a sale-deed four items of properties were purported to be sold but it appeared that the parties did not intend that title should pass thereunder in respect of one item and that it was included merely to have the document registered in another Registration District,

Held, that the vendor who was a party to the fraud could not sue to establish that the document was not validly registered and could therefore be ignored.

Appeals against the decrees of the Court of the Additional Subordinate Judge of Bapatla in A. S Nos. 28, 27 and 28, and 28 of 1924 preferred against the decree of the Court of the District Munsif of Ongole in O. S. No. 601 of 1921.

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* S. A. Nos. 717, 1541 and 1893 of 1925. 14th September, 1931.

Venkataswami v. Venkata Subbayya.

Reilly, J.

The facts of the case sufficiently appear in the judgments.

P. Venkataramana Rao for Appellants.

B. Somayya for 1st Respondent.

The Court delivered the following Judgments :—

Reilly, J.—[The material portion of the judgment is as follows.]

* * * *

It is not now disputed that all the property concerned in the suit, as has been found by the Lower Courts, was the property of Karavadi Ramaswami at the time of his death in 1860 and that after his death Mahalakshmamma had only a widow's interest in it. The sale-deed Ex. I, which I have mentioned, was dated the 7th September 1908 and was executed by Rangamma and her three sons then living, the Plaintiff, Defendant 43 and an elder brother, Venkatappayya, now dead. It was in favour of Defendant 1, who is now represented by Defendants 2 to 4 as his legal representatives and by other contesting Defendants as transferees from him. Ex. I is a registered document ; but in it a small item of one cent is included which never belonged to the vendors and which it has been found was never intended by any of the parties to Ex. I to pass to the vendee. It was included only for the purpose of getting the document registered in a particular Sub-Registrar's office, in which no sale-deed relating to the other items, which were intended to be transferred, could have been registered. The Plaintiff in his plaint pleads that the inclusion of item 4 in the document and getting the document so registered in an office where otherwise it could not have been registered was a fraud on the Registration law and that therefore the document has not been validly registered and he can ignore it. On the facts there is no doubt that that was a fraud against the Registration Act. The evidence is in effect that the plaintiff, his brother, Defendant 43, and Defendant 1, the vendee, all joined in that fraud. The District Munsif and the Subordinate Judge therefore found that Ex. I was not validly registered and had no legal effect. Before us a contention has been raised for the contesting Defendants that the Plaintiff cannot plead his own fraud in that way and that, even if this fraud had come to the notice of the Court otherwise, no relief could be given to the plaintiff in the suit on that basis but that the maxim *in pari delicto potior*

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est conditio defendentis et possidentis should be applied. It cannot be denied that as a general rule a Plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter is not made better by showing that the Defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. *Gascoigne* v. *Gascoigne*[1] and *Scott* v. *Brown*.[2] In the latter case the plaintiffs sued on an illegal contract involving an indictable offence. The illegality was not pleaded, and, although the trial Judge noticed it he did not let it affect the disposal of the case before him. It was the Lord Justices in the Court of Appeal who themselves took the point. Smith, L. J. said

"If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action,"

and he applied the maxim *In pari delicto potior est conditio possidentis*. Lindley, L. J. said

"It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him".

I do not think there can be any doubt about the general rule. But it has been suggested that there is an exception when the fraud or illegality disclosed is in contravention of some rule of public policy embodied in a Statute and that, if that is so the plaintiff may be allowed to vindicate the law and public policy to his own profit in spite of his own fraudulent or illegal act. So far as I understand the matter, there is no such exception. In *Cottington* v. *Fletcher*,[3] the plaintiff was a Papist who owned an advowson, *i.e.*, the right to present to a living in the church of England. By a Statute, William and Mary C. 26, no Papist can present to a living in the church of England, nor can any one who holds an advowson in trust for a Papist. To protect his property Cottington assigned the advowson to Fletcher under an arrangement that Fletcher should hold it in trust for him, and Fletcher presented to the living the second defendant in the case. Subsequently Cottington became a conforming Protestant, and he then sued for a re-assignment of the advowson. Lord Hardwicke indicated his opinion that, if Fletcher had raised a demurrer that Cottington could not plead

1. (1918) 1 K. B. 223.
2. (1892) 2 Q. B. 724.
3. (1741) 2 Atk. 156 : 26 E. R. 498.

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his fraud against the law in that way, Fletcher would have succeeded. The report of that case is not very full; but in *Muckleston* v. *Brown*[4]. Lord Eldon, commenting upon the case, expressed strongly the same view, though he appears to have doubted whether the report was correct in another respect. There it will be seen that Cottington was disclosing a contravention of what was regarded as a matter of the highest public policy, and yet he would not have been allowed to do so if objection had been raised. In *Curtis* v. *Perry*[5] Chiswell, a Member of Parliament had allowed ships bought by his partner, Nantes, with the partnership money to be registered in the name of Nantes alone in order that they might be used for contracts with the Government in violation of the Contractors' Act, under which no Member of Parliament could have any interest in any contract with the Government. Lord Eldon said

> "The moment the purpose to defeat the policy of the law by fraudulently concealing that this was his (Chiswell's) property is admitted, it is very clear he ought not to be heard in this Court to say that it is his property".

And there the rule was applied, although there had been a fraud against another Statute also, 34 Geo. III C. 68, under which the name of the owner of every ship had to be registered. But no vindication of public policy even in those very important matters could avail against the general rule. In the same case Lord Elden quoted an unnamed and unreported case, in which Lord Kenyon dismissed a bill for the reconveyance of property given by the plaintiff to his son as a nominal qualification for a seat in Parliament in fraud of a Statute regarding qualifications for Parliament. In none of those cases was the fact that the confession of fraud would have disclosed the contravention of an important rule of public policy embodied in a Statute treated as having any effect in qualification of the general rule. It will be observed that Cottington was trying by his plea to undo the evasion of a Statute and thereby to recover his property, almost exactly what the plaintiff is trying to do in respect of Ex. I, in this case.

Can we suppose that there is any special sanctity about the Registration Act, which would bring in an exception to the general rule? No doubt the Registration of a sale-deed in the proper office is a matter of public policy. But it can hardly be suggested that it is a matter of higher public policy than the

4. (1801) 6 Ves. Jun. 52 : 31 E. R. 934.
5. (1802) 6 Ves. Jun. 740: 31 E. R. 1285.

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questions dealt with in the cases I have quoted. Why should the plaintiff, who has joined in the fraud in this case, be allowed to profit by it or to plead it ? Is it a matter of over-mastering public policy that the vendee under Ex. I should not be allowed to remain in possession because Ex. I was not validly registered ? I think a recent amendment of the law by the Legislature shows that there can be no such over-mastering public policy in connection with the Registration Act. Under S. 53-A recently added to the Transfer of Property Act a vendee, who has got only an unregistered sale-deed, may protect his possession by pleading part-performance and may actually use the unregistered sale-deed to prove the terms of the sale. When the Legislature has provided in that way for effect being given to a transfer, though the Registration Act has not been complied with, we cannot say that it is even a matter of public policy that the vendee under Ex. I should not be allowed to remain in possession. In my opinion the plaintiff cannot be allowed to plead or take advantage of any invalidity in the registration of Ex. I. Ex. I on its face is a validly registered document, and for the purpose of this case we must treat it as such.

[His Lordship then dealt with the other points in the case.]

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—[The material portion of the judgment is as follows :—]

Under Exhibit I, four items of properties are purported to be sold to the 1st defendant. The fourth item covered by Exhibit I is one cent of inam dry land situate in Chadala village attached to Ongole Sub-Registration District ; whereas items 1, 2 and 3 of Exhibit I are lands attached to Kothapatnam Sub-Registration District. The document was presented to the Ongole Sub-Registrar for registration and was registered by him. The allegation in paragraph 3 of the plaint regarding this matter was as follows :—

" Besides this, whereas the 1st defendant should have got the said document registered at Kothapatnam, he got it registered at Ongole by including unjustly and fraudulently some other properties unnecessarily. Hence the said document is not at all valid in law and the 1st defendant cannot acquire any right whatever under the said document."

The 1st defendant's plea was that item 4 also was sold to him but that the plaintiff and others re-purchased from the 1st defendant the one cent of land (item 4) on payment of a small amount and are in possession thereof.

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Both the Lower Courts have held that the parties to Exhibit I could never have intended that item 4 should form part of the property conveyed by the document, and that it could never have been intended that any title should pass thereunder in item 4—one cent—and that the executants of Ex. I had no shadow of title to that one cent and that the 1st defendant also must be taken to have been aware of the same. It was for the convenience of the plaintiff, and his brother, the 43rd defendant—who was employed at Ongole—and at their suggestion that item 4 was included in Ex. I, and the document registered at Ongole. On these facts it was argued for the plaintiff that the registration of Ex. I is invalid in law. On behalf of the 1st defendant it was argued that the plaintiff was equally party to the fraud as the 1st defendant and that it is not open to the plaintiff to allege his own fraud and claim relief on that basis. The plaintiff's learned advocate replied to this argument by saying that the Registration Act is a statute of public policy, and that there could be no estoppel against the provisions of such a statute. Our attention was also drawn to the decisions of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*[6] and *Biswanath Prasad* v. *Chandra Narayan Chowdhuri*[7]. After having the question argued before us, I have come to the conclusion that it is not open to the plaintiff in such circumstances to allege his own fraud and claim relief on that basis. In Broom's Legal Maxims, the maxim is quoted—'*Nemo allegans turpitudinem suam est audiendus*'—No one alleging his own baseness ought to be heard. Another maxim is referred to, viz., *Nullus commodum capere potest de injuria sua propria*—No one can take advantage of his own wrong. It is also said '*In pari delicto potior est conditio possidentis*'—In equal fault, the condition of the possessor is more favourable. Various decisions have been cited in support of the principle underlying the above legal maxim, but I do not propose to go into the same.

It is stated in Story's Equity Jurisprudence, Vol. I, section 421:

"In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of

6. (1914) L. R. 41 I. A. 110: I. L. R. 41 Cal. 972 : 27 M. L. J. 80 (P. C.).
7. (1921) L. R. 48 I. A. 127: I. L. R. 48 Cal. 509: 40 M. L. J. 489 (P.C.).

Equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis et possidentis*. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort."

See also 3rd Edition of Story's Equity Jurisprudence by Randall, section 298.

In *Raghupati* v. *Nrishingha*[8] Justice Sir Asutosh Mookerjee discusses this question. The learned Judge in addition to quoting some English authorities also quotes the following passages from certain American decisions :

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalise the benefits or burthens which may have resulted by the violation of every principle of morals and of laws. Or, as Chancellor Walworth states it: 'Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct."

In *Scott* v. *Brown*[9] the Court of Appeal made certain observations which are relevant to the present case. Lindley, L. J., said:

"*Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*[10]."

Lopes, L. J., quoted an extract from the judgment of Cockburn, C. J., in *Begbie* v. *Phosphate Sewage Co.*[11] to the following effect :—

"The plaintiff cannot present his case to the jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

8. (1922) 36 C. L. J. 491. 9. (1892) 2 Q. B. 724.
10. (1775) 1 Cowp. 341 at 343: 98 E. R. 1120.
11. (1875) L. R. 10 Q. B. 491 at 500.

Venkata-swami v. Venkata Subbayya.

Ananta-krishna Aiyar, J.

It has to be observed that, though the illegality of the contract was not pleaded by the defendant, the point was taken by the Court and acted upon.

A. L. Smith, L. J., observed at page 734 :

"Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester*[12] where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Co*[11], where it was not pleaded, but, the fraud being apparent, the Court would not interfere."

In *Petherperumal Chetty* v. *Muniandy Servai*[13] the Privy Council held that the contemplated fraud must, according to the authorities, have been effected and that then, and then alone, does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with (*see* page 559).

In the present case the fraud has been effected, the plaintiff has got his money, and the defendant was put in possession of the properties. Therefore the plaintiff could not be given relief. Reference may be made to a decision of this Court in *Janu Sait* v. *Ramasami Naidu*[14]. There the plaintiff entered into a contract for the purchase of rice in violation of rice control regulations. The rice purchased was subsequently commandeered by the Government under the regulations. It was held that the purchaser was not entitled to recover the portion of the price paid by him to the defendant by reason of such commandeering when it was proved that both the plaintiff and the defendant knew of those restrictions and were parties to the illegal contract. Justice Phillips observed at page 568:

" When both parties are *in pari delicto*, the maxim '*In pari delicto potior est conditio possidentis*' applies and the Courts will not assist the plaintiff to recover in such a case."

Justice Devadoss observed at page 576 as follows:—

"In this case, the contract has been fully completed and the plaintiff who seeks relief on the ground of fraud is not entitled to it, as I find on the evidence that he was not deceived as regards the terms of the licence, and his conduct in getting rice without a licence to buy in Negapatam was in violation of the rules framed in the interests of the public. This point is fatal to the plaintiff's case and he is entitled to no relief."

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11. (1875) L. R. 10 Q. B. 491. 12. (1869) L. R. 4 Q.B. 309.
13. (1908) L. R. 35 I. A. 98: I. L. R. 35 C. 551: 18 M. L. J. 277 (P.C.).
14. (1923) 18 L. W. 564.

Venkataswami *v.* Venkata Subbayya. — Ananta krishna, Aiyar, J.

See also *Jones* v. *Merionethshire Permanent Benefit Building Society*,[15] where Lindley, L. J., observed:

"A plaintiff is not entitled to relief in a Court of Equity on the ground of the illegality of his own conduct. In order to obtain relief in equity he must prove not only that the transaction is illegal, but something more; he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief."

Some very early English decisions were also cited to us in which the Court made similar observations that the plaintiff in such circumstances would not be given any relief when he has to plead his own fraud as part of his cause of action.

The fraud in this particular case having been effected, as already mentioned, it is enough to rely on the decision in *Petherperumal Chetty* v. *Muniandy Servai*[13] to decide this point against the plaintiff. The Privy Council decisions in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*[6] and *Biswanath Prasad* v. *Chandra Narayan Chowdhuri*[7] are not really applicable to the exact point that we are now considering. The question there was not whether the plaintiff could be allowed to set up his own fraud, but whether registration was properly and validly effected when the question arose with reference to third parties.

[His Lordship dealt with the other points and dismissed the plaintiff's appeal while allowing the second appeals of defendants two to six and nine to twelve]

B. V. V. *Decree modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

P. C. — Raja Raghunandan Prasad Singh *v.* Raja Kirtyanand Singh Bahadur.

Raja Raghunandan Prasad Singh and another .. *Appellants**

v.

Raja Kirtyanand Singh Bahadur .. *Respondent.*

Surety bond—Construction—Liability of surety for stated sum—Liability, if absolute or only for deficiency up to the limit—Application or suit

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*P. C. Appeal No. 93 of 1930. 12th February, 1932.
Patna Appeal No. 59 of 1928.

6. (1914) L.R. 41 I.A. 110: I.L.R. 41 Cal. 972: 27 M.L.J. 80 (P.C.).
7. (1921) L. R. 48 I. A. 127: I. L. R. 48 Cal 509: 40 M. L. J. 489 (P.C.).
13. (1908) L. R. 35 I. A. 98: I. L. R. 35 Cal. 551: 18 M. L. J. 277 (P.C.).
15. (1892) 1 Ch. 173 at 182.

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Raja Raghunandan Prasad Singh v. Raja Kirtyanand Singh Bahadur.

to enforce—Limitation applicable—New plea—Late stage—Injury to opponent.

An application to enforce a security bond against the surety should, under the Indian Limitation Act, be made within three years if it is properly an application in the suit, or within six years if it should be made by independent suit.

Where a bond is executed by a surety in pursuance of an order of Court, the bond should be considered in the light of the order directing the security to be given.

A bond by way of security executed by the defendant (a puisne mortgagee), in pursuance of an order of Court, granting stay of execution pending an appeal from a mortgage decree for one year from April, 1919, provided as follows: (i) (if the appeal be disposed of within one year from 1st April, 1919), "the defendants shall pay the sum of Rs. 77,000 or whatever may be payable under the High Court order not exceeding Rs 77,000, (in default) any amount so payable as aforesaid shall be realised from (me); (ii) (if the appeal be not so disposed of within one year), the decree-holders according to the order of the High Court shall be able to execute their decree with interest and to realise Rs. 77,000 from me." The appeal was dismissed in July, 1921. The mortgaged properties were sold in January, 1925. There was a deficiency and in January, 1927, the decree-holders applied to enforce the bond. The surety pleaded that the application was barred by limitation.

Held, that on a true construction of the document,

(*a*) it was not an absolute security which the decree-holders were to be free to realise immediately on the 1st April, 1920; it was a security to the extent of Rs. 77,000 for the balance, if any, remaining unpaid after sale;

(*b*) until the property was sold, the liability under the bond could not be enforced and the date of sale being January, 1925, the application in January, 1927, to enforce the bond was in time;

(*c*) the objection to the maintainability of the application on the ground that a suit was the proper remedy was not open to the surety, as it had not been raised in India or in the printed case before the Board, having regard to the fact that if the objection prevailed, the decree-holders would be barred by lapse of time from enforcing their proper remedy.

Judgment of the High Court, Patna, reported in *Raja Raghunandan Prasad Singh* v *Raja Kirtyanand Singh Bahadur*, (1928) I.L.R. 8 Pat. 310, reversed.

Appeal No. 93 of 1930 from a decree of the High Court, Patna, dated the 16th August, 1928, which affirmed an order passed by the Subordinate Judge of Monghyr, dated the 28th July, 1927, dismissing the decree-holders' (appellants') application under S. 145, Civil Procedure Code, to enforce a registered security bond, dated the 7th August, 1919, executed by the respondent.

De Gruyther, K. C. (with *Wallach*) for appellants.

Dunne, K. C. (with *Hyam*) for respondent.

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Raja Raghunandan Prasad Singh v. Raja Kirtyanand Singh Bahadur.

Lord Tomlin.

12th February, 1932. Their Lordships' judgment was delivered by

LORD TOMLIN.—On the 22nd December, 1917, a decree was obtained in a suit to enforce a mortgage against the mortgagor and a puisne mortgagee, who is respondent here. The decree was in the ordinary form of such decrees in India; that is, six months were given for redemption, and at the end of that time in default of redemption the property was to be sold. The decree did not contain, and having regard to Order 34 of the Civil Procedure Code could not contain, a personal judgment against the mortgagor for the mortgage money. An appeal to the High Court against the decree was duly taken by the mortgagor. On the 31st August, 1918, the decree was made absolute.

On the 25th October, 1918, an application was made to the Subordinate Judge by the decree-holders to bring the property to sale.

On the 2nd April, 1919, an order of the High Court was made by consent for a stay, and the order was in these terms: "Let the respondents' petition for execution"—the respondents means the decree-holders—"now pending be stayed for the period of one year as and from the 1st April, 1919, upon the appellant" (meaning thereby the mortgagor) "furnishing solvent security in the Lower Court to the satisfaction of the Subordinate Judge by the 1st May, 1919, for the sum of 1 lakh and 12,000 rupees. In the event of the appellant's appeal to this Court not being disposed of within the period of one year calculated from the 1st April, 1919, let a further stay be granted for a period of one more year from the 1st April, 1920, upon the defendant's [*sic*] furnishing solvent security in the Lower Court to the satisfaction of the Subordinate Judge for a further sum of 1 lakh and 12,000 rupees, such last-mentioned security to be furnished on or before the 1st April, 1920, in the event of such further or additional stay being necessary."

Pursuant to that order there was executed* by the respondent here (he being as already indicated a puisne encumbrancer and as such the second defendant to the suit)

* Executed on the 7th August, 1919.—K. J. R.

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a bond by way of security to satisfy in part the solvent security required by the High Court for the sum of 1 lakh and 12,000 rupees. The sum of 1 lakh and 12,000 rupees seems to have been fixed because it represented one year's interest on the mortgage money, and the object was to put the decree-holders ultimately in the position of being no worse off by reason of one year's delay in enforcing their security.

The bond* so executed by the respondent was in this form:—It recited the suit and the decree of the 22nd December, 1917, in favour of the plaintiffs in the suit and that the defendants in the suit had preferred appeals to the High Court, and it further recited that the decree-holders had applied to execute the decree and that the defendants had made an application for a stay and that they had been called upon to furnish security by the order of the 2nd April, 1919,. to which reference has already been made. Then it proceeds as follows: "Accordingly I of my own free will stand security to the extent of rupees seventy-seven thousand out of rupees one lakh and twelve thousand as therein ordered and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court within one year from the 1st April, 1919, the said defendants shall duly act in accordance with the decree of the said Appellate Court and they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand, but if they should fail to pay the sum of rupees seventy-seven thousand, then any amount so payable as aforesaid shall be realised from my person and my legal representatives shall be personally liable to pay the same."

Up to this point the document provides for the case of the decree of the first Court being confirmed or varied by the Appellate Court within one year from the 1st April, 1919—an event which did not happen. The next clause, however, deals with events which did happen in the following terms: "Be it known that if the judgment-debtors fail to furnish security to the extent of rupees one lakh and twelve thousand on the 1st April, 1920, in case the appeals be not decided within that date then the decree-holders according to the order of the High Court shall be able to execute their decree with interest and

*The security bond was duly registered in Book 4 under the Indian Registration Act.—K. J. R.

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Lord Tomlin.

shall be able to realise rupees seventy-seven thousand from me and my representatives the money secured by this bond."

In December, 1920, the application by the decree-holders to bring the property to sale seems to have been struck out. The appeal against the decree in the suit was not heard before the 1st April, 1920. It was, in fact, heard on the 19th July, 1921, and was dismissed. On the 6th March, 1922, there was a further application for execution of the judgment, and on that application an order was made for the sale of the property. On the 26th January, 1925, the property was sold under that order, and, as appears from the account of the proceeds of the sale, the sale did not realise by a sum of 93,000 odd rupees enough to satisfy the amount due on the mortgage.

On the 16th December, 1925, there having been an appeal from the High Court to their Lordships' Board, an order in Council was made affirming the original decree and making an order with regard to additional costs.

On the 25th January, 1927, the decree-holders made an application in the suit to enforce the bond against the respondent here. Upon that application the questions arose which fall for the determination of the Board to-day.

On the 18th May, 1927, a decree was passed in the suit ordering the mortgagor in the suit to pay the balance of the mortgage money. After that the application of the present appellants to enforce the respondent's bond came before the Subordinate Judge, and on 28th July, 1927, he delivered his judgment. He stated that the issues were as follows:—(1) Is the application barred by limitation? (2) As the interest due from April, 1919, to March, 1920, has already been realised by the sale of the mortgaged property, can the decree-holders realise the surety money from the applicant? (3) Is the security without consideration? (4) Is the petitioner precluded from raising this point after notice under Order 21, Rule 22? Has the said notice been served? He dealt, first of all, with the point with regard to interest, and their Lordships understand that the view that he took was this: Inasmuch as the one lakh and twelve thousand rupees was fixed by reference to the amount of the interest for one year, the rupees seventy-seven thousand mentioned in the bond was, in fact, part of the interest for that one year ending 31st March, 1920, and further

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that as the purchase money received on the sale would have been applied first in satisfaction of interest before being applied in satisfaction of capital, therefore the liability for which the seventy-seven thousand rupees had to answer had disappeared and, that being so, the giver of the bond was under no liability in respect of it. That was his answer to the second point.

The learned Judge held upon the first point, which he dealt with next, that the application was not barred by the Statute of Limitations.

Then he dealt with the points about consideration and notice which do not now arise, and he concluded that the decree-holders, the appellants here, were not entitled to realise anything in respect of the bond as the dues for which the respondent here stood surety had all been satisfied.

An appeal was taken to the High Court and on 16th August, 1928, the judgment of the High Court was delivered and the appeal was dismissed. The Judges of the High Court took a different view from that of the Subordinate Judge. They rejected the conclusion of the Subordinate Judge that the bond was given for interest only, and held that upon the true construction of the bond the sum of Rs. 77,000 had become payable on the 1st April, 1920, and therefore that the appellants were statute barred and not in a position to enforce the bond against the respondent.

In their Lordships' judgment the success or failure of this appeal depends primarily upon the true construction of the bond, the material passages of which have already been stated. The bond must be considered in the light of the order directing the security to be given. It will be observed that under the terms of that order no payment had to be made immediately on the expiration of the first year for which the stay was granted, but what is said is that the stay is allowed for one year from the 1st April, 1919, upon the decree-holders furnishing solvent security in the Lower Court for the sum of one lakh and twelve thousand rupees; in other words, the decree-holders are to get, in addition to the existing mortgage, further security for one lakh and twelve thousand rupees which shall put them in a position not worse than they would have occupied if the stay had not been granted.

In those circumstances what is the meaning of the language employed in the bond? In the first part of the clause which has

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been read this phrase occurs: "And they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand." Although that phrase occurs in the clause which applies to the event which did not happen it is some indication as to whether or not the rupees seventy-seven thousand was an absolute sum which was to be paid in any case, and in their Lordships' judgment it indicates that it was not necessarily such a sum. When the terms of the clause which operated in fact are looked at it is found that two things are to result in the event there mentioned; one is that the decree-holders shall be able to execute their decree with interest, and the other is that they shall be able to realise rupees seventy-seven thousand from the giver of this bond and his representatives. It is not a clause which puts upon the giver of the bond an obligation to make an immediate payment in cash; it is a clause which puts the decree-holders in the position of having a realisable security of rupees seventy-seven thousand. The question is whether that is an absolute security which the decree-holders are to be free to realise immediately on the 1st April, 1920, or whether it is security to the extent of rupees seventy-seven thousand for the balance of the sum, if any, remaining unpaid after the mortgage property has been realised.

In their Lordships' judgment, upon the true construction of this document having regard to the circumstances in which it was executed, this bond is a bond for securing the balance unprovided for by the proceeds of sale of the mortgage property, up to a sum not exceeding rupees seventy-seven thousand.

Upon that view of the case it is plain that until the property was sold the liability of the giver of the bond, the respondent here, could not be enforced. The application which was made in January, 1927, was necessarily within time inasmuch as under the Indian Limitation Act it must either be within three years if the application is properly an application in the suit, or within six years if the application should have been made by independent suit.

The point was not raised below that the application should have been made by independent suit and the point was not taken by the respondent in his printed case before their Lord-

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ships' Board. Having regard to the fact that the point has never been taken before, and that if it was allowed to be taken now and succeeded the appellants would be barred by lapse of time, although their original application was in time, their Lordships are of opinion that it is not open to the respondent to take the point here.

The result, therefore, is that the appeal must be allowed. There will be a declaration that the appellants are entitled to receive from the respondent, his person and property the amount now properly payable under the bond on the footing that the bond is a security up to seventy-seven thousand rupees for the deficit on the mortgage. If necessary, there must be an enquiry to ascertain what the amount is and for that purpose the case should be remitted to the High Court. The appellants must have their costs throughout. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondent: *Barrow, Rogers & Nevill.*

K.J.R./S.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR DINSHAH MULLA.

The Benares Bank, Limited .. *Appellants**

v.

Hari Narain and others .. *Respondents.*

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The Benares Bank, Ltd. v. Hari Narain.

Hindu Law—Joint family—New business started by manager—Non-liability of minor members—Business not ancestral though started by the father as manager.

In the case of a joint Hindu family, whether governed by the Dayabhaga or the Mitakshara, the father or manager has no power to impose upon a minor member of the family the risk and liability of a new business started by him. A business started by the father as manager cannot, if new, be regarded as ancestral so as to render the minor members' interest in the joint family property liable for debts contracted in the course of the business.

Sanyasi Charan Mundal v. *Krishnadhan Banerji*, (1922) L. R. 49 I. A. 108 : I. L. R. 49 Cal. 560 : 43 M. L. J. 41 (P. C.), followed.

Hunoomanpersaud Panday v. *Mst. Babooee Munraj Koonweree*, (1856) 6 M. I. A. 393, referred to.

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*P. C. Appeal No. 95 of 1930. Allahabad Appeal No. 54 of 1928.

5th May, 1932.

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The Benares Bank, Ltd. *v.* Hari Narain.

Appeal No. 95 of 1930 from a decree of the High Court, Allahabad, dated the 8th August, 1928, which modified a decree of the Court of the Subordinate Judge of Allahabad, dated the 27th August, 1925.

The suit giving rise to the appeal was instituted by the appellant Bank for recovery of Rs. 27,261-9-4 on foot of a mortgage, dated the 1st September, 1911, executed by the adult members of a joint Hindu family governed by the Mitakshara, and the main question for determination on the appeal was, whether of the sum secured by the mortgage, Rs. 10,000 was borrowed either for payment of antecedent debts or for legal necessity, so as to render the minor members' interest in the joint ancestral property liable for the repayment thereof.

Dunne, K. C. and *Douglas McNair* for appellants.

Wallach for respondents.

5th May, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This appeal involves questions which frequently arise in suits to enforce a mortgage against property which belongs to a Hindu joint family governed by the Mitakshara where the mortgage is executed by the father for himself and for his minor sons as their guardian.

The family in this case consisted of two brothers, Jagdish Narain and Raghubir Narain and their respective sons. Jagdish Narain had five sons, two of them, Suraj Narain and Dip Narain being adults, and the other three minors. Raghubir Narain had three sons, all of whom were minors.

On the 1st September, 1911, the adult members of the family borrowed Rs. 28,000 from the Benares Bank, Limited, the appellants before this Board, and executed a deed whereby they mortgaged six properties belonging to the family, one situated at Allahabad, another at Manjhiari, and the rest in the Fatehpur district, to secure the debt and interest, each father signing as guardian of his minor sons. The mortgage deed recited that the mortgagors were in need of money to pay off two previous mortgages, one for Rs. 7,000 in favour of Dwarka Bibi, and the other for Rs. 11,000 in favour of Kishun Narain, and to carry on the mortgagors' business.

In 1913 the mortgagors paid Rs. 4,128 to the bank. In 1919 they sold one of the Fatehpur properties, and paid a further sum of Rs. 29,700. Jagdish Narain died in 1921. The balance not having been paid, the bank brought the present suit

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in the Court of the Subordinate Judge of Allahabad on the 27th April, 1923, against the surviving members of the family, who are respondents in this appeal, to enforce the mortgage against the remaining five properties.

The adult members of the family who had executed the mortgage did not defend the suit, but a written statement was filed on behalf of such of the sons of the two brothers as were minors at the date of the mortgage. The defence was that there was no consideration for the mortgage and no necessity for the loan. As to the business referred to in the mortgage deed, their case was that Jagdish Narain started a *theka* business in 1902 or 1903 and took building contracts from the Public Works Department at Benares, and that the business was the personal business of Jagdish Narain, and not a joint family business.

It would appear from the bank's books and other documents produced at the trial that Rs. 18,000 was paid in cash by the bank to the mortgagors, and that the balance of Rs. 10,000 was credited to the account of Suraj Narain pursuant to a letter dated the 24th September, 1911, addressed by the four adult members to the bank. It would also appear that Rs. 6,342 out of the Rs. 10,000 was transferred by the bank to the account of Bhagwati Prashad on the instructions of Suraj Narain, and the balance of Rs. 3,658 was withdrawn by cheques drawn by Suraj Narain in favour of Ambika Prashad who attended to the *theka* business.

The Subordinate Judge found that the whole consideration was paid by the bank, that Rs. 18,000 was applied in discharging the two previous mortgages, that Rs. 6,342 was paid to Bhagwati Prashad to whom the family owed that amount, and that the balance of Rs. 3,658 was used for the *theka* business which he held was a family business. He also held on some evidence given in the case (to be presently referred to) that the Allahabad and Manjhiari properties belonged to Jagdish Narain and Suraj Narain, and not to the joint family. On these findings he passed a preliminary mortgage decree for the whole debt and for costs.

On appeal to the High Court at Allahabad, the judgment of the Subordinate Judge was reversed on all points except as to Rs. 18,000 which the defendants did not contest at the hearing of the appeal. As to Rs. 6,342 the High Court decided that there was no evidence on the record to show that the family

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owed that amount to Bhagwati Prashad. As regards Rs. 3,658 used in the *theka* business they held that the business was not a family business, but the personal business of some adult member of the family, and that even if it was a family business, it was not ancestral so as to render the minors' shares liable for that debt. As to the Allahabad and Manjhiari properties they took the view that they belonged to the joint family, and not to the two brothers. Their conclusion therefore was that the mortgage was valid to the extent only of Rs. 18,000, and after taking certain accounts they passed a decree on the 8th August, 1928, in modification of the decree of the trial Judge in the following terms :—

"It is ordered and decreed that this appeal be allowed in part, that in modification of the decree of the Subordinate Judge of Allahabad, the plaintiff's claim to the extent of Rs. 18,000 with interest thereon, for which the mortgage in suit was valid and which has been paid up by the defendants, be dismissed as against the appellants and the mortgaged property, and that a simple money decree be and it hereby is passed in favour of the plaintiff-respondent as against Raghubir Narain, Dip Narain and Suraj Narain personally and as against the heirs of Jagdish Narain deceased to the extent of the personal assets of the said deceased in their hands other than the mortgaged property, for recovery of Rs. 24,794-8-0 (twenty-four thousand seven hundred and ninety-four and annas eight), viz, Rs. 10,000 principal and Rs. 15,242-8-0 interest at Re. 0-12-0 per cent. per mensem simple from the date of the bond up to the 8th August, 1928, the date of this Court's decree, in all Rs. 25,242-8-0 minus Rs. 448 excess amount paid by defendants, and that the sum of Rs. 10,000 shall carry future interest at Re. 0-12-0 per cent. per mensem until realisation. It is further ordered that the parties shall bear their own costs throughout"

From this decree the bank has brought the present appeal to His Majesty in Council. The appeal is directed against all the points decided by the High Court against the bank.

As to the Allahabad and Manjhiari properties their Lordships were told by counsel for the bank that they were worth a good deal more than the amount claimed by the bank, and that if it were held that they belonged to Jagdish Narain and Raghubir Narain it would be unnecessary to consider the questions arising on the items of Rs. 6,342 and Rs. 3,658. This, no doubt, correctly represents the legal position, but their Lordships are unable to hold upon the facts that these properties belonged to the two brothers.

The bank's case as laid in the plaint was that all the properties were joint family properties, and this was admitted in the written statement filed on behalf of the minors. No issue was raised as to the ownership of these two properties, and no evidence was led on behalf of the bank that they belonged to

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the two brothers. The first time any indication was given by the bank of its contention as to these properties was in the cross-examination of Suraj Narain, who was a witness for the defence. Their Lordships think that in these circumstances the trial Judge ought not to have allowed the bank to make a new case at the close of the trial unless at least the plaint was amended and an issue was raised on it. Apart, however, from this consideration, their Lordships are of opinion that the evidence on the record is too meagre to support the bank's case. The whole of the evidence as given by Suraj Narain on this question was as follows:—

"Sheo Devi was my grandmother. She had the property of Manjhiari village which was given to her by her husband and a house No. 70 at Chowk Ganga Das. That same house and village property are among the mortgaged properties in the bond in question. There is a *mahal* Sheo Devi in Manjhiari. It belonged to my said grandmother. I do not recollect the year when my grandfather had made a gift to my grandmother. . . Sheo Devi died some nineteen years ago."

No particulars of the alleged gift are given. It is not stated whether it was in writing or oral, nor is it stated when and where it was made. It is impossible to hold on this evidence that the properties were acquired by Sheo Devi as a gift from her husband, and that they descended on her death to the two brothers as her heirs.

The next question relates to the item of Rs. 6,342. As to this item the bank's case is that the family owed that amount to Bhagwati Prashad and that it was credited to his account with the bank pursuant to a letter from Suraj Narain to the bank dated the 27th September, 1911; that Bhagwati Prashad owed Rs. 5,278-13-4 to the bank under a promissory note; and that as a result of the payment of Rs. 6,342 into his account, his liability to the bank was discharged, and a balance of Rs. 1,063-2-8 was left to his credit which he afterwards received from the bank in cash. The principal witness on behalf of the bank was Babu Maharaj Kishore, who was the manager of the bank at the date of the mortgage. In his evidence he said that he had made inquiries from Jagdish Narain (who had died before the suit) or Suraj Narain as to the necessity of the loan and he was told that the family was indebted to Bhagwati Prashad and the debt had to be paid. This was denied by Suraj Narain in his evidence. He deposed that he was not present when the loan was negotiated, but that he was told by

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Jagdish Narain that he wanted a loan of Rs. 22,000 only, but the bank refused to give any loan unless he borrowed a further sum of Rs. 6,000 and paid it into the account of Bhagwati Prashad in liquidation of his debt to the bank. As to the letter of the 27th September, 1911, he said that he wrote it at the dictation either of Babu Maharaj Kishore or Balram Das. The Subordinate Judge did not believe his evidence, and held that the family was indebted to Bhagwati Prashad, and that the debt due to him was an antecedent debt and the minors' shares therefore were liable for it. The High Court also, it would appear, did not accept the evidence of Suraj Narain, but they held that there was no evidence on the record to show that the family was indebted to Bhagwati Prashad.

Their Lordships find themselves unable to agree with the High Court. Babu Maharaj Kishore did say in his evidence that he was told by Jagdish Narain or Suraj Narain that the family was indebted to Bhagwati Prashad. As to this evidence the High Court say that it is "very unsatisfactory and is no more than a mere guess or hearsay." Their Lordships are unable to accept this view. The bank was the lender, Suraj Narain was a borrower, and the statement as to the indebtedness of the family was made by the borrower to the lender's agent. Such a statement repeated by the lender's agent in his evidence in a suit by the lender against the borrower is not, in their Lordships' view, hearsay. But the matter does not rest there. There is the letter of the 27th September, 1911, addressed by Suraj Narain to the bank asking the bank to pay Rs. 6,342 to Bhagwati Prashad out of the Rs. 10,000 left with the bank. The testimony of Suraj Narain as to the circumstances in which that letter was written having been discarded as unreliable, there was no alternative left to the Court but to hold, in the absence of any other explanation, that the payment which the bank was asked to make by that letter to Bhagwati Prashad was in respect of a liability to him either of Jagdish Narain and Raghubir Narain or of the whole family. There being no evidence that the liability was incurred for a necessity, it must be deemed to have been a personal liability of the two heads of the family. The Subordinate Judge held that this liability existed before the mortgage and therefore constituted an antecedent debt. It was argued before their Lordships that the liability might have been incurred after the date of the

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mortgage. But the short interval between that date and the date of the letter renders that view highly improbable. Their Lordships are therefore of opinion that the mortgage as regards this item must be deemed to have been made for the payment of an antecedent debt of Jagdish Narain and Raghubir Narain and it was therefore binding upon their sons.

The only other question is as to the item of Rs. 3,658 borrowed for the *theka* business. It was urged on behalf of the bank that the business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand it was contended that the business was the personal business of Jagdish Narain and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagdish Narain and Raghubir Narain as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt.

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1]. The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chap. I of the Mitakshara. The judgment of the Board in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[2], relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

1. (1922) L. R. 49 I. A. 108 : I. L. R. 49 C. 560.: 43 M. L. J. 41 (P. C.).
2. (1856) 6 M. I. A. 393.

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It was also urged on behalf of the bank that even if the business was not ancestral, the family was liable for the debt as the bank had made reasonable and *bona fide* enquiries which led it to believe that the business was ancestral and that there was a necessity for the raising of money for the purpose of the business. Their Lordships are not satisfied that the bank made reasonable inquiries as to the ancestral character of the business.

The mortgage as to Rs. 3,658, being neither for a necessity recognised by the law nor for the payment of an antecedent debt, is, in their Lordships' view, wholly invalid under the Mitakshara law as applied in the United Provinces, and it does not pass the shares even of the alienating coparceners.

A further point was raised for the first time on behalf of the bank that the bank was at least entitled to a decree for the sale of the minors' interest in execution on the principle enunciated in the second of the five propositions laid down by the Board in *Brij Narain* v. *Mangla Prasad*[3]. But the point was not taken in the Courts below, and as it might involve, as was conceded, questions of fact not yet tried, it is not open to the bank to raise it at this stage.

The result is that the mortgage is valid to the extent of Rs. 24,342 instead of Rs. 18,000 as held by the High Court. This will reduce the personal liability of the adult members of the family named in the decree from Rs. 10,000 to Rs. 3,658.

The decree of the High Court quoted above was passed after an account had been taken as directed in their judgment. The following are the material portions of the judgment:—

"Although the plaintiff Bank did not ask for it, we think that it is well entitled to a simple money decree for Rs. 10,000, the amount of unsecured debt. In view of the payments made from time to time, and the clear acknowledgment of liability in a large number of documents, of which Exhibit 34, dated the 29th August, 1919, may be cited as an exemplar, the claim for a money decree is amply within limitation. We pass a simple money decree for Rs. 10,000 against Raghubir Narain, Dip Narain and Suraj Narain personally and against the heirs of Jagdish Narain, limited in the case of these heirs to the extent of the personal assets of Jagdish Narain in their hands other than the mortgaged property together with simple interest at twelve annas per cent. per mensem from the date of the bond up to the date of realisation, subject to the further direction, which we proceed to give.

"The mortgage is valid to the extent of Rs. 18,000 with interest at twelve annas per cent. per mensem with six monthly rests. The mortgagors have already paid to the plaintiff Bank Rs. 33,828-4-9. We direct that an account

3. (1923) L. R. 51 I. A. 129: I. L. R. 46 A. 95 : 46 M. L. J. 23 (P. C.).

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be taken of the sums due and the sums received up to the date in 1919 when Rs. 29,700 was received by the plaintiff Bank. If after adjustment of the debits and credits any sum of money be found due to the plaintiff Bank, a decree for the said amount be passed under Order 34, rule 4 of the Code of Civil Procedure. If no amount be found due, the plaintiff's claim against the appellants and the mortgaged property be dismissed. If after adjustment of the debits and credits, a surplus be found in favour of the mortgagors, the same should be applied towards the reduction of the simple money debt and the simple money decree be passed only for the balance "

The account was taken as directed by the High Court, and it showed a surplus of Rs. 448 in favour of the mortgagors. The result was that the bank's claim in respect of the mortgage was dismissed, and the personal liability of the adult members was reduced by Rs. 448 as appears from the decree.

The account directed by the High Court was taken on the footing that the mortgage was valid to the extent of Rs. 18,000 only. The mortgage being valid, in their Lordships' view, for Rs. 24,342, a fresh account will have to be taken on that footing, substituting Rs. 3,658 for Rs. 10,000, and Rs. 24,342 for Rs. 18,000, in the judgment of the High Court quoted above.

Their Lordships will therefore humbly advise His Majesty (1) that this appeal should be allowed in part ; (2) that it should be declared that the mortgage is valid to the extent of Rs. 24,342; (3) that the case should be remitted to the High Court to take an account on that footing of what will be due to the bank on the mortgage, and to modify their decree as regards the form and figures according to the result of the account, and otherwise to give effect to their Lordships' opinion; and (4) that the decree of the High Court should be affirmed subject to the above variations and directions. The bank will have two-thirds of the costs before the Board and in the Courts below, and the costs will be tacked to the mortgage debt. The costs of further proceedings in India will be dealt with by the High Court.

Solicitors for appellants: *Morgan, Price, Marley and Rugg.*
Solicitors for respondents: *T. L. Wilson & Co.*

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commitment was presented on 23rd March, 1932. An application for staying the Sessions trial of the other case (Cr. M. P. No. 318 of 1932) was put in on the 29th March. As that case was already under trial at that time I did not feel justified in granting any further stay than to direct a stay of judgment for one week. This order was made on 30th March, 1932 and that stay expires to-day. I understand that the case is posted for judgment on 8th April, two day hence.

I think there can be no doubt that the commitment in this case must be quashed for the simple reason that the accused had no opportunity of adducing their defence evidence before committal. The Code gives one opportunity to an accused to adduce evidence before the charge is framed and a second to get the charge set aside if he can induce the Magistrate to do so by further defence evidence after the charge. There is no doubt now with the omission of the words "he shall stop further proceedings" in S. 347, Criminal Procedure Code, that when a Court trying a warrant case determines to commit the case, it must follow the procedure in Chapter XVIII. See the remarks in In re *Chinnavan*[2] and In re *Damodaram*[3]. The learned Public Prosecutor did not contend that the commitment could be upheld, but it was argued by Mr. Ethiraj for the complainant in the present case that it must be shown that the accused had sustained prejudice. None of the cases quoted for this have I consider any bearing. *Ram Ghulam* v. *Emperor*[4] is a case exactly similar to In re *Chinnavan.*[2] The whole trial had proceeded right up to the stage of the delivery of judgment. The accused therefore had been able to call the whole defence evidence and had had more opportunities of cross-examining the prosecution witnesses than they would have had under Chapter XVIII. It was therefore held that the commitment need not be quashed. Another case quoted is *Bhat* v. *Emperor.*[5] That case can be distinguished from the present by the fact that it was found that the accused knew that the case would be committed though it was tried as a warrant case. Here, there could have been no such anticipation on the part of the accused. As I have remarked above, not only were they

2. (1914) 23 I. C. 734. 3. (1929) I. L. R. 52 Mad. 995: 57 M. L. J. 555.
4. A. I. R. 1931 All. 434. 5. A.I.R. 1931 Bom. 517.

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asked to plead to the charge but they were asked further whether they wished to recall and cross-examine the prosecution witnesses. The commitment I think must obviously be quashed.

If the accused are to be committed, and if further proceedings under Chapter XVIII are to be continued, the question will arise as to whether the accused have the right of further cross-examining the prosecution witnesses. It is argued on their behalf that, as they anticipated that they would have an opportunity of cross-examining them after the charge, they did not do so as fully as they would otherwise have done. The learned Public Prosecutor quotes *G. V. Raman* v. *Emperor*[6] to the contrary. I do not think, however, that case bears him out. In that case I gather though it is not clearly stated that when the very first witness was being examined, the Court said that it would treat the case as a committal case and not as a warrant case. That this decision could not have intended to lay down, that if the case were treated as a warrant case throughout and then committed, the accused would have no right of cross-examining, is clear from the remarks on page 54 where the Bench says:

> "It is possible, and it generally so happens, that the Magistrate starts a case before him with a view to try it himself; but in the midst of the trial, when certain facts have been disclosed, he makes up his mind to commit the accused to the Sessions. When the trial was commenced before him, he treated it as one of a warrant case and the accused exercised the right to reserve cross-examination after charge. If, in the midst of the trial or immediately after finishing the evidence for the prosecution, the Magistrate decides to commit the accused to the Sessions, it does not seem just to the accused that he should, at that stage, because the Magistrate has come to a certain decision, lose the right which he had before such decision. In such a case, section 347 should not be held as compelling the Magistrate to refuse to allow the accused to cross-examine the witnesses and to commit at once the case to the Sessions."

So this is not an authority for the view contended for by the learned Public Prosecutor. I do not, however, think it necessary to say anything final on this point, because I am convinced, under the circumstances of this case, that the ends of public justice will best be served by quashing the commitment and ordering the Court to dispose of the case itself and continue the proceedings at the point where it determined to commit. I may perhaps note one other slight irregularity to avoid a possible future objection. On 2nd February, 1932, after the charge was framed and pleaded to, the Court asked the accused

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6. (1929) I. L. R. 57 C. 44.

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whether they wished to re-call and examine the prosecution witnesses. The question should under the Code have been deferred until the next day, unless, for reasons recorded, the Magistrate saw fit to do otherwise : *vide* S. 256. In order to make the matter perfectly regular, the Magistrate should now again ask the accused this question.

It has been strongly urged before me by the learned Public Prosecutor and by Mr. Ethiraj that this Court has laid down that a case and a counter-case should be tried together. There is nothing in the Code defining the procedure and it is quite obvious that all these remarks by learned Judges are meant to expedite justice and in the interests of it. To take first the case quoted by the learned counsel In re *Krishna Pannadi*[1]. In that case, both the cases were already before the Sessions Court and after the pronouncement of the judgment convicting in one case, the Public Prosecutor withdrew the other. That is not a case similar to the present at all, and the observations made must be taken in the light of that particular case.

Then comes *G. Krishtamma*, In re[7]. There were there a case and a counter-case, one of which was triable by the Magistrate and the other by the Sessions. The Police charge-sheeted both the cases. The Magistrate convicted the accused in one case and committed the other case to the Sessions. The learned Judges remarked that there is nothing to prevent him committing to Sessions under S. 347 and that the case and the counter-case arising out of the case should, if practicable, be tried by the same Court. It may be noted that this opinion is *obiter* and was not necessary for the disposal of the case, but its soundness cannot be disputed. Then there is the decision of Jackson, J., in *Sathakutti Pillai* v. *Pichai Cruz*[8]. That again refers to cases already before the same Court and the learned Judge does not even say there that the cases must both be charged, for he says, they should be conducted together as far as charge or discharge. Other High Courts have taken a somewhat different view on this matter.

In *Emperor* v. *Karam Singh*[9] it was held that in committing cases not exclusively triable by the Court of Session, Magistrates should exercise a proper discretion and give adequate reasons for making commitment to the Court of

1. (1929) 58 M. L. J. 352.
7. (1929) 2 Mad. Cr. C. 238.
8. (1931) M. W. N. 1316.
9. A. I. R. 1930 Lah. 312.

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Sessions. Reasons should be such as to show whether the commitment is made in the sound exercise of the discretionary power vested in the Magistrate by law, and if he does not give adequate reasons, the commitment may be quashed. It is further observed that a case triable by a Magistrate should not be committed merely to avoid a possible conflict of decisions and that the proper course is to await the result of the Sessions trial. Another case is *Emperor* v. *Nathu*[10]. It is there stated that an apparent connection of a case under S. 326, Penal Code, with a case under S. 302 is no ground whatsoever for committing it to the Sessions Court when the offence involved is triable and can be adequately punished by a First Class Magistrate or one exercising powers under S. 30, Criminal Procedure Code. If the object of the Magistrate is to avoid a possible conflict of decisions it can be achieved by awaiting the result of the Sessions trial in the case under S. 302. I do not at all wish to say that this is the view which has been taken by the Madras High Court, but it has not been laid down anywhere as an absolute rule that all charges and counter-charges must be tried by the same Court. If the learned Magistrate in this case had started with commitment proceedings, it would have been probably the best course for all concerned, but what I have to look to as things stand at present is, whether it would be at all in the interests of public justice to order him to proceed with this case now as a Pr. Case. It will inevitably mean in the first place an examination of the defence witnesses before a charge is framed, for, of course, the charge will have to be set aside in order to get back to the stage at which the Pr. case proceedings can be applied. I understand accused have cited more than 50 defence witnesses. Then, as I said, I am rather inclined to think that the accused would be entitled to further cross-examine all the prosecution witnesses. After the charge they would again be entitled to call further defence witnesses, and all this to enable the Sessions Court to try this case along with the counter-case. If these committal proceedings occupy two or three months, is his judgment in the other case which has been concluded to be held up indefinitely ? Supposing even the judgment which is probably being now written is stayed, is the Court to attempt to erase the recollection of it from its mind? If it does so, by the

10. A. I. R. 1932 Lah. 168.

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time the counter-case came to Sessions five or six months afterwards, the facts in the present Sessions case would have been forgotten by the learned Judge. It may be noted that though Mr. Ethiraj says a great deal here about prejudice to the private complainant in the case before the Magistrate, if cases are not both tried before the Sessions Court, the complainant evidently did not wake up to that prejudice till after the charge was framed and till his pleader quoted *Krishna Pannadi* v. *Emperor*[1] to the Magistrate. It is even possible that the learned Magistrate discovered that case himself. If a procedure is laid down in the Code, that procedure must be followed even if in any particular case it might cause great delay and hardship or even a possible failure of justice; but where there is no procedure laid down in the Code, I see no reason at all why this Court, in order to enforce the very salutary observations made by Judges of this Court, should treat these as if they were rigid and inflexible rules which have to be followed, no matter what the delay, absence of benefit, or possible miscarriage of justice which this course may lead to. I see little use, and many objections to this case being now committed to Sessions. I am of the opinion that the proper order to be passed in this case is, that the commitment order should be quashed and that the Court should dispose of the case as a warrant case bearing in mind the remarks which I have made with regard to again asking the accused whether they wish to recall and cross-examine any of the prosecution witnesses.

Commitment quashed.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Bondada Manumallaswami and another .. *Appellants** (*Defendants Nos.* 1 *and* 2)

v.

Rinisetti Chinna Narayanaswami (deceased) and others .. *Respondents* (*Plaintiffs* 1 *and* 2 *and L. Rs. of* 1*st Plaintiff*).

Manumalla-swami v. Chinna Narayana-swami.

Will—Construction—Hindu will—Disposition in favour of wife—Gift over to sister's sons—Limited estate with power of disposal inter vivos.

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* S. A. No. 1723 of 1926. 2nd March, 1932.

1. (1929) 58 M. L. J. 352.

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If the intention of a testator as represented by his words is to confer an absolute estate, that estate cannot be cut down by anything that follows. If, however, the intention is doubtful, the addition of a gift over may be evidence that his intention was to confer no more than a limited interest.

A Hindu provided by his will as follows: "After my death, my wife *A* shall have the power of gift and sale in all my moveable property, which should remain unsold and undisposed of by me in gift in my lifetime. My wife *A* should have power to adopt any boy she would like, if she feels inclined to make an adoption, with power to give him such property as she should like; she has power to make such adoptions till my family is perpetuated. If she does not like to make an adoption my sister's sons *M* and *V* should, after her lifetime enjoy in equal moieties with power of gift and sale, they, their sons, grandsons, etc., in succession such of the property which my wife should not have disposed of by gift or sale in her lifetime."

Held, that the effect of the will was to confer a limited estate on the testator's wife with a power of disposal *inter vivos* and to give over to his sister's sons what she did not dispose of.

Appeal against the decree of the Court of the Subordinate Judge of Narsapur in A. S. No. 82 of 1924 preferred against the decree of the Court of the District Munsif of Narsapur in O. S. No. 829 of 1921.

T. R. Venkatesa Aiyar, V. Govindarajachari and *C. S. Venkatachariar* for appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *A. Satyanarayana* for respondents.

The judgment of the Court was delivered by

Waller, J.

Waller, J.—The question in this second appeal is as to the construction of the will of a Hindu named Jagannatham. The material part of the will reads as follows:—

"After my death, my wife Andalamma shall have the power of gift and sale in all my moveable property, which should remain unsold and undisposed of by me in gift in my lifetime. My wife Andalamma should have power to adopt any boy she would like, if she feels inclined to make an adoption, with power to give him such property as she should like; she has power to make such adoptions till my family is perpetuated. If she does not like to make an adoption my sister's sons, viz. (1) Bondada Manumallaswami and (2) Jibu Raghavayya's son Venkateswara Rao, should, after her lifetime, enjoy in equal moieties, with power of gift and sale, they, their sons, grandsons, etc., in succession (*i.e.*, from generation to generation) such of the property which my wife should not have disposed of by gift or sale in her lifetime."

The plaintiffs in the suit, who are the sons of Jagannatham's paternal uncle, contend that the widow took, under the will, an absolute estate and that they are entitled to succeed to her property. The 1st and 2nd defendants, who are Jagannatham's sister's sons and the residuary legatees named in the will, plead that she took only a life-estate and that the gift over

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in their favour is valid. The District Munsif found in favour of the latter and dismissed the suit. On appeal, the Subordinate Judge, holding that the will conferred an absolute estate on the widow and that the gift over was of no effect, gave the plaintiffs a decree. In arriving at that conclusion, he seems to have been influenced more by the many rulings cited before him than by the language of the will itself and by the idea that, in modern times, the Courts have inclined to the view that a bequest to a Hindu widow should be construed as conferring an absolute rather than a life-estate. The result of the construction placed by him on the will was to make a great part of it of no effect and to set aside the clearly expressed intentions of the testator. In *Sanford* v. *Sanford*[1] Joyce, J., pointed out that

> "The rule is to construe a will *ut res magis valeat quam pereat*, and to give effect, so far as possible, to all the words used by the testator"

quoting the dictum of Kay, J., in *Williams* v. *Pounder*[2]. As for the citation of cases, it is well settled that the will of one testator cannot be construed by reference to that of another. In the judgment above referred to Joyce, J., observed :

> "It has been said by the Court of Appeal that the true way to construe a will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given."

As is customary in cases of this kind, a large number of decisions—English and Indian—have been cited before us. None of them, of course, deals with a testamentary disposition couched in precisely the same terms as that we are now concerned with—so that they are of no great assistance to us, save to the extent that they lay down some general rule of construction. The first thing we have to consider is the language of the document itself. It begins by giving the widow a power of gift and sale over all the testator's property. It goes on to authorise her to adopt a son to whom she can give "such property as she should like." Failing such adoption, the testator's sister's sons are, after her death, " to enjoy in equal moieties with power of gift and sale they, their sons, grandsons, etc., in succession such of the property which my wife should not have disposed of by gift or sale in her lifetime." There are, in our opinion, no words which connote an intention to confer an absolute estate on the widow. It is impossible not to

1. (1901) 1 Ch. 939. 2. (1887) 56 L. J. Ch. 113.

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contrast the language used in making the gift with that used in making the gift over. The gift to the wife confers on her a power of disposal limited explicitly to her lifetime. The gift over, on the other hand, was of a quite absolute estate, which was to pass from father to son, from generation to generation. The gift did not include a power of disposition by will, but a power of disposition *inter vivos*. As observed by James, L. J., in *Herring* v. *Barrow*[3]:

"If there is one thing clearer than another in the case, it is that the testator intended his own will, and not that of his wife, to be that by which the destination of his property was to be determined."

The same is the case here. The widow could dispose of the property in her lifetime, but had no power to dispose of it by will and, if any property remained at her death, the will of the testator was to settle its destination.

The rule in such cases is that, if the intention of the testator as represented by his words, was to confer an absolute estate, that estate cannot be cut down by anything that follows. If, however, the intention is doubtful, the addition of a gift over may be evidence that his intention was to confer no more than a limited interest. Here, the worst that can be said is that his intention, as conveyed by the language of the gift, was not clear and the gift over showed that his intention was to confer no more than a limited estate. If the will is construed in this way—that the intention was to give the wife a limited estate, with a power of disposal *inter vivos* and to give over what she did not dispose of, every word of the will becomes effective. That is in accordance with the first rule of construction of testamentary dispositions and it has, as Joyce, J., observed in the case already cited, "the not unimportant merit of effectuating the obvious and expressed desire of the testator." In this view, we think that the trial Judge construed the will correctly. We restore his decision and dismiss the suit with costs throughout.

It is urged that we should give the respondents a decree for Rs. 1000 against the 4th and 5th defendants. The latter have not been made parties to the second appeal and there is nothing said about this sum of money in the decree of the Lower Appellate Court. It is not for us to put the matter

3. (1881) 14 Ch. D. 263.

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right, even if the intention of the Lower Appellate Court was to award this sum to the respondents. The request of the respondents raises an entirely fresh point of law, which was not argued before us and is not mentioned in the judgment appealed against. Both Courts seem to have assumed that the destination of this money must follow the construction of the will, but the Lower Appellate Court left it out of its decree altogether. We must decline to consider the question at this stage.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE KRISHNAN PANDALAI.

P. C. Muthu Chettiar .. *Appellant* (Plaintiff)*

v.

Muthuswami Aiyangar .. *Respondent (5th Defendant).*

Muthu Chettiar v. Muthuswami Aiyangar.

Limitation Act (IX of 1908), S. 19—Mortgagor and mortgagee—Alienation of part of mortgaged property—Subsequent acknowledgment by mortgagor—Effect as against alienee.

When a mortgagor has sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the alienation is effective both against the mortgagor and his alienee.

Krishna Chandra Saha v. *Bhairab Chandra Saha,* (1905) I.L.R. 32 Cal. 1077, *Velayudam Pillai* v. *Vaithialingam Pillai,* (1912) 24 M. L. J. 66 and *Lakshmanan Chetty* v. *Muthaya Chetty,* (1919) 40 M.L.J. 126, referred to.

Appeal against the decree of the District Court of Madura in A. S. No. 164 of 1927 preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 75 of 1926.

S. Varadachariar for *K. S. Champakesa Aiyangar* for appellant.

K. Rajah Aiyar for respondent.

The Court delivered the following

JUDGMENTS. *Jackson, J.*—The question for determination is whether an acknowledgment by the mortgagor in favour of a prior mortgagee precludes a puisne mortgagee, whose title accrued before the acknowledgment was given, from relying

Jackson, J.

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*S. A. No. 1206 of 1928. 22nd March, 1932.

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upon the Statute of Limitation as a bar. Can a mortgagor alienate the hypotheca and then acknowledge the mortgage debt so as to give a fresh period of limitation as against not only himself but the alience ?

A plain reading of S. 19, Indian Limitation Act, would suggest that the acknowledgment affects both the mortgagor and his alienee:

" Where before the expiration of the period prescribed . . . . an acknowledgment of liability . . . has been made . . . by some person through whom the party derives title, a fresh period shall be computed."

In *Krishna Chandra Saha* v. *Bhairab Chandra Saha*[1] it was held that the mortgagor is the person from whom the alienee derives his title, and the section does not say that the acknowledgment must necessarily be given before the alienation. This opinion is endorsed in *Velayudam Pillai* v. *Vaithialingam Pillai*[2] which is affirmed in *Lakshmanan Chetty* v. *Muthaya Chetty*[3].

On the other hand there is the dissident opinion of a Judge in *Surjiram Marwari* v. *Barhamdeo Persad*[4] endorsed *obiter* in *Yagnanarayana* v. *Venkatakrishna Rao*[5] "the acknowledgment binds only assignees from him after the acknowledgment." But one of the learned Judges of that Bench has questioned whether this *obiter* is correct in Second Appeal No 1485 of 1927. Therefore the preponderating view both in Calcutta and Madras is that the acknowledgment is equally effective whether it be before or subsequent to the alienation. As Maclean, C. J., observes in *Krishna Chandra Saha* v. *Bhairab Chandra Saha*[1]

" It seems difficult to get over the precise language of this section."

It has been argued, however, that the Courts ought to read "derives title subsequently to the acknowledgment" into the section, for otherwise it will run contrary to English Law and to equity. If both parts of this plea were established we should still feel constrained to follow the plain reading of the statute, but it is not so clear that such a reading would offend either English Law or equity.

The words of the English statutes are not precisely similar to those in S. 19 of the Indian Limitation Act, and we have been shown no case directly bearing upon the point.

1. (1905) I.L.R. 32 Cal. 1077.
2. (1912) 24 M.L.J. 66.
3. (1919) 40 M.L.J 126 at 127.
4. (1905) 1 C.L.J. 337.
5. A. I. R. 1925 Mad. 1108.

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In 19 Halsbury p. 95 it is said that payment by a mortgagor after he has assigned the property charged does not prevent time running in favour of an assignee. But payment is not the same as acknowledgment, and we have not seen the ruling upon which this statement is based; apparently it is not forthcoming in Madras. As regards equity, to say that an alienee would be robbed of a natural right if his alienor were allowed to acknowledge a mortgage binding upon the alienated property even after the alienation, is to travel very far from actual reality. An alienee who takes property subject to a mortgage, expects that he will naturally have to meet that encumbrance, and can only regard it as a remote contingency that the mortgagee may sleep over his right and allow time to run. As the law stands, that contingency is rendered rather more remote by the circumstance that even when time has almost run out the mortgagor by his acknowledgment can extend the period. But if we agree with the respondent and put this extension out of the power of the mortgagor with regard to prior alienees, the contingency of the mortgagee allowing time to run and thus foregoing his right would still be very remote; and to speak of alienees in general being disappointed because they have not been relieved of their encumbrances by the statute of limitation is too fanciful. On the other hand it is plainly equitable that a mortgagee should be paid his debt, and that the time should be extended if the mortgagor acknowledges that debt. It would be a great hardship if the mortgagee were led to put his trust in such an acknowledgment only to find that it was a dead letter because, say a day previously, the mortgagor had parted with the hypotheca. As observed in *Krishna Chandra Saha* v. *Bhairab Chandra Saha*[1] a mortgagee should not be deprived of his right by the act of parties entitled only to the equity of redemption.

It is unnecessary now to discuss the reasoning in *Surjiram Marwari* v. *Barhamdeo Persad*[4] which has never met with approval except in *Yagnanarayana* v. *Venkatakrishna Rao*[5]. Mukerjee, J., admits that there is no English case directly in point and relies upon the analogy of S. 13, Civil Procedure Code. But an analogy though it may fortify can hardly be made the basis of an argument; and since S. 19, Indian Limi-

1. (1905) I. L. R. 32 C. 1077. 4. (1905) 1 C.L.J. 337.
5. A.I.R. 1925 M. 1108.

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tation Act, is plain, there is nothing upon which an argument can stand. As the appellant is not precluded by limitation the next question is how far he is entitled to subrogate. We agree with the Lower Courts that the obviously equitable arrangement is that set forth in para. 21 of the first Court's judgment. A plea of subrogation is a plea in equity and there is no rule of law which would constrain us to decree anything less equitable.

The appellant succeeds in the main and is entitled to costs here and in the Lower Appellate Court against 5th defendant.

Time for payment three months from this date.

Krishnan Pandalai, J.

Krishnan Pandalai, J.—I agree on both points with my learned brother and wish to add a few words of explanation on the first, which is one of acknowledgment as saving limitation. The plaintiff sues on a third mortgage by 1st defendant's husband, dated 29th September, 1911, comprising several properties. In 1913 the mortgagor sold a few of those items to 5th defendant partly to pay off the first two mortgages due to the 5th defendant himself and partly to pay off a portion of the plaintiff's (third) mortgage. The 5th defendant did not pay to the plaintiff the portion of the mortgage amount which he undertook to pay. In 1920 the mortgagor (1st defendant's husband) made a statement in a deposition in Court which is an acknowledgment of the plaintiff's third mortgage. This suit was brought in 1926. It is plain that without the help of the acknowledgment of 1920 the suit for money by sale of the property would be barred as it is brought more than 12 years from the date for payment and also from any other available starting point of limitation. The 5th defendant's contention is that after the 1st defendant's husband's sale to himself, he (1st defendant's husband) was incompetent to acknowledge the mortgage liability so as to affect the properties sold, as he had no interest in them and could therefore be under no liability in respect of them.

I wish to guard myself by limiting my present opinion to a case like the present where at the time of making the acknowledgment the mortgagor through whom the purchaser undoubtedly claims, is under some liability, either personal or in respect of some other property, on the mortgage. It is in the present case unnecessary to say whether after a mortgagor's personal liability had become barred and he had sold all the mortgaged property any acknowledgment by him of the mortgage

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debt can save limitation against the purchaser. It is sufficient to indicate that an acknowledgment under S. 19 must be an admission of some present liability of the person acknowledging, corresponding to a present right in some one else. If it did not imply that, it would be hardly correct to talk of it as an acknowledgment. But it is not necessary to pursue this point further.

The more limited point to be decided is whether when a mortgagor has sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the sale is ineffective to save limitation as against the property sold. I agree with my learned brother that the language of S. 19 does not require that the person through whom the 5th defendant claims (here 1st defendant's husband) must have made the acknowledgment before the alienation. Nor does the reason of the thing appear to demand it so long as at the time the acknowledgment is made the person making it is liable for what he acknowledges—in other words, so long as he is acknowledging his own liability and not alleging some one else's liability. The weight of Indian authority to which my learned brother has referred is also in the same direction.

As during the argument, reference was made to the English law of limitation and decisions on it, I have taken some pains to discover whether there is in that law any corresponding idea to what is contended for by 5th defendant. I need not say, that except for the discovery of some general principle, it would be totally misleading and profitless to attempt to apply decisions on the English statutes of limitation to cases under the Indian Limitation Act. The differences between the two systems are glaring and lie on the surface. There is nothing about acknowledgment or part payments in the Limitation Act of 1623 which is still in force. The whole law on that topic in the class of suits governed by that Act is still Judge-made law. In such suits acknowledgments may be made even after the expiration of the period of limitation and provided they are within six years of the suit furnish a new cause of action as on a new promise to pay. In the case of acknowledgments statutorily provided for in 3 and 4 Will. IV. c. 27 and 3 and 4 Will. IV. c. 42 and Real Property Limitation Act, 1874, in some there is no provision as to the person to whom the acknowledgment is to be

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made, whereas in the others it is provided that it must be made to the person entitled to the payment or to his agent. In none of them is there any reference to acknowledgments made by a person through whom the defendant claims though much the same result is attained by the provision that the acknowledgment must be signed by the person liable or his agent. In the case of *Newbould* v. *Smith*6 it was held that a mortgagor who had in July, 1878, assigned the mortgaged property to his nephews could not by making payment of interest in September, 1878, to the mortgagee save limitation in favour of the assignees. The ground stated was that after the assignment, the assignor was not the agent of the person liable (the present owner) to make the payment of interest. I therefore think that the line of argument based on English law is not fruitful.

B. V. V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD THANKERTON, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

K. B. Seth Sorabjee .. *Appellant**

v.

Seth Dwarkadas Ranchhoddas and others .. *Respondents.*

P. C. — Sorabjee v. Dwarkadas Ranchhoddas.

Transfer of Property Act (IV of 1882), S. 63—Indian Trusts Act (II of 1882), S. 90—Accretions to mortgaged property—Subordinate tenures acquired by mortgagee for his own benefit—Right of mortgagor to.

Section 63 of the Transfer of Property Act cannot be read as entitling the mortgagor to recover on redemption acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Indian Trusts Act. The mortgagor is not entitled on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them.

Rajah Kishendatt Ram v. *Rajah Mumtaz Ali Khan*, (1879) L. R. 6 I.A. 145: I. L. R. 5 Cal. 198 (P. C.), referred to.

Ram Brich Narain Singh v. *Ambika Prasad Singh*, (1913) 17 C. W. N. 586, disapproved.

Appeal No. 2 of 1931 from a decree, dated the 25th June, 1927, of the Court of the Judicial Commissioner, Central Provinces.

Although the value of the subject-matter of the suit in the Court of first instance was less than Rs. 10,000, the learned Judicial

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*P. C. Appeal No. 2 of 1931. 24th May, 1932.

6. (1886) 33 Ch. D. 127.

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Commissioners held that the case came within the second clause of S. 110 of the Civil Procedure Code. and applying the ruling of the Board in *Udoychand Pannalal* v. *Gusdar & Company*[1] they came to the conclusion that "the issue of this suit involves, at least indirectly, property worth over Rs. 10,000". They accordingly granted a certificate to the plaintiff for leave to appeal to His Majesty in Council.

On the 12th February, 1932, when the appeal came on for hearing before the Board composed of Viscount Dunedin, Lord Thankerton and Sir Dinshah Mulla, a preliminary objection was taken by counsel for the respondents that the appeal was not, in view of the Board's judgments in *(Gudivada) Mangamma* v. *(Maddi) Mahalakshmamma*[2], and *Rajendra Kumar Ghosh Bahadur* v. *Rash Behari Mandal*[3], maintainable. Their Lordships sustained the objection but were of opinion that as an important question of law was involved, the appellant should have special leave to appeal.

During the arguments, reference was made to the decisions in *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan*[4] and *Ram Brich Narain Singh* v. *Ambika Prasad Singh*[5] and to Fisher on Mortgage, Chapter on "Accretions to the Security" and to Shephard and Brown's Commentary on the Transfer of Property Act, 7th edition, page 276.

De Gruyther, K. C. (with *Parikh*) for appellant.

Upjohn, K. C. (with *Hyam*) for respondents.

24th May, 1932. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—This appeal was originally before the Board on the 12th February, 1932, when, upon a preliminary objection taken by the appearing respondents, their Lordships agreed humbly to advise His Majesty that the certificate of the Court of the Judicial Commissioner of the Central Provinces admitting the appeal was wrongly granted but that special leave to appeal ought to be granted to the appellant upon lodging a petition for that purpose. This petition was duly lodged, and their Lordships' report was approved by Order in Council of the 17th March, 1932.

1. (1925) L. R. 52 I. A. 207 : I. L. R. 52 C. 650 : 49 M. L. J. 20 (P. C.).
2. (1929) L. R. 57 I. A. 56 : I. L. R. 53 M. 167 : 58 M. L. J. 184 (P. C.).
3. (1931) 61 M. L. J. 273 (P. C.).
4. (1879) L. R. 6 I. A. 145 : I. L. R. 5 C. 198 (P. C.).
5. (1913) 17 C. W. N. 586.

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The case, which comes here on appeal from a judgment and decree in second appeal, raises a question of some importance as to the right under the existing law in India of a mortgagor of proprietary rights to recover on redemption subordinate tenures acquired by the mortgagee during the subsistence of the mortgage. This question came before this Board in *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan*,1 before the enactment in 1882 of the Indian Trusts Act and the Transfer of Property Act. In that case the mortgagee of the proprietary rights of a talookdar had acquired during the continuance of the mortgage certain subordinate tenures in the taluq known as *birts*, and their Lordships found on the facts of that case that the mortgagee taking advantage of his position as *de facto* talookdar had acquired the *birts* on very favourable terms and had allowed them to merge in the taluq, and that it would be inequitable to allow him on redemption to revive the *birts* for his own benefit. They accordingly held that the mortgagor was entitled to redeem the estate as then enjoyed by the mortgagee on paying the original mortgage money plus the purchase money of the *birts*. They at the same time made it clear that they were not prepared to affirm the proposition that every purchase of a sub-tenure by the mortgagee must be held to have been made for the benefit of the mortgagor. The judgment reads:

"Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

"It may well be that when the estate mortgaged is a zemindary in Lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mokurraree istimrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurraree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the mokurraree."

At the close of their judgment their Lordships referred to the English decisions which they observed were only applicable because they were agreeable to general equity and good conscience, and said:

1. (1879) L. R. 6 I. A. 145; I. L. R. 5 C. 198 (P. C.).

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"It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer*[2] as to the renewal of a term obtained by the mortgagee of the expired term, being, 'as coming from the same root,' subject to the same equity, has never been impeached."

The equitable principles applied by their Lordships in that case to acquisitions by a mortgagee have now been embodied by S. 90 of the Indian Trusts Act, 1882, in a wider rule dealing with acquisitions by tenants for life, co-owners, mortgagees and other qualified owners. The section is as follows:—

"90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

Illustrations.

(*a*) *A*, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindu family. *A*, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. *A* holds the village for the benefit of himself and the other members.

(*c*) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*."

It has, however, been suggested in an Indian case, *Ram Brich Narain Singh* v. *Ambika Prasad Singh*,[3] which was cited for the appellant both below and here, that S. 63 of the Transfer of Property Act goes further than S. 90 of the Indian Trusts Act, and entitles the mortgagor on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. It would

2. (1729) 2 P. Wms. 511.

3. (1913) 17 C. W. N. 586.

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be strange indeed if these two measures, which were drafted by the Indian Law Commission in England and passed into law in the same session of the Indian Legislature, should be found to contain inconsistent provisions as to the same state of facts, but in their Lordships' opinion no such inconsistency is to be found. Sections 63 and 64 of the Transfer of Property Act are as follows:—

"63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

"Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

"In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

"Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

"64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease."

Section 64 may be said to give statutory effect to the rule in *Rakestraw* v. *Brewer*,[2] which was referred to by their Lordships in the passage already cited, as it was apparently thought better to provide expressly for this particular acquisition by a mortgagee instead of leaving it to be governed by the general provisions of S. 90 of the Indian Trusts Act; but in their Lordships' opinion there is nothing inconsistent with that section in the provisions of S. 63 of the Transfer of Property Act as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word "accession" is not defined in the Act, but the section deals expressly with accessions which have been acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. Whether the term accession as used in this section

2. (1729) 2 P. Wms. 511.

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should also be held to cover acquisitions which the mortgagee has made for his own benefit, but is bound under S. 90 of the Indian Trusts Act to hold for the benefit of the mortgagor need not be decided. S. 90 itself provides for the mortgagor bearing the cost of the acquisition in such a case, but S. 63 goes somewhat further and contains as well an express provision as to profits arising from the accession where the mortgage is usufructuary. In the present case it is sufficient to say that their Lordships are clearly of opinion that S. 63 of the Transfer of Property Act cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Indian Trusts Act.

Their Lordships have thought right to make these observations because there would appear to have been much misconception on this subject in the present case with which they will now proceed to deal.

In November, 1908, one Rajaram mortgaged with possession his four annas proprietary share in mauza Khandwa Tarf Kunbi, together with numerous other properties to the predecessors of defendants 1 to 4. Two of these four one anna shares in this mauza were subsequently sold to the mortgagees in 1912; another was brought to sale in court auction and purchased by the fifth defendant, and the remaining one anna share was also brought to sale and acquired in 1918 from the auction purchaser by the plaintiff, who instituted the present suit for redemption in the Court of the Subordinate Judge of Khandwa on the 23rd December, 1921.

Mauza Khandwa Tarf Kunbi is more than 4,000 acres in extent, but the present appeal only relates to two Survey Numbers 451 and 452 of 5¼ and 3 acres respectively. The mortgagees were apparently anxious to acquire them on account of their proximity to the town of Khandwa, and are found to have erected a ginning press on one of them at a cost of Rs. 8,000.

As regards Survey No. 452 the mortgagees in 1906, more than two years before the execution of Rajaram's mortgage in their favour, had obtained from his brother and co-sharer Govindram, who was also the owner of a four annas share in the mauza, a sale deed in which he purported as malguzar and

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lambardar to sell them the whole proprietary rights in this Survey Number. Subsequently to the date of the mortgage on the 8th October, 1910, they obtained a deed from the occupancy tenants by which the latter gave up their tenancy right for ever and surrendered it to the predecessors of defendants 1 to 4 as proprietors on receipt of Rs. 2,135 on account of tenancy rights and improvements.

As regards Survey No. 451 the occupancy tenants on the 22nd May, 1915, purchased from Rajaram's uncle Totaram the remaining co-sharer in the mauza, his eight annas proprietary share in this Survey Number for a consideration supplied by the predecessors of defendants 1 to 4, in whose favour they executed on the following day a sale deed of the proprietary and tenancy rights in the Survey Number. The sale deed recited that they had formerly been occupancy tenants and had subsequently purchased the malikana or proprietary rights from Totaram.

In paragraph 10 of his rejoinder the plaintiff alleged that after the execution of the mortgage deed there had been accretions to the mortgaged property as shown in Schedule K filed therewith. In Schedule K the occupancy rights acquired in these two Survey Numbers subsequent to the creation of the mortgage were claimed as accretions to the mortgage, but as half the mortgagor's proprietary rights in the mauza had been acquired by the mortgagees subsequent to the mortgage, only half of each Survey Number was claimed as an accretion to the mortgage. "The defendants' possession over half of this field at least," it was alleged as regards each of these Survey Numbers, "must be deemed to be that of mortgagees as the acquisition thereby made was that of an occupancy holding". In other words, the whole occupancy rights acquired by the mortgagees in these Survey Numbers were claimed as an accretion or accession to the mortgage, although the mortgage was only of Rajaram's four annas share in the mauza, and although the mortgagees had acquired Govindram's four annas share in Survey Number 452 and Totaram's eight annas share in Survey Number 451. This claim was the subject of issues 17 and 18.

17. Whether there have been accretions to the mortgaged property as shown in the plaintiff's Schedule K?

18. If so, are defendants 1 to 4 bound to deliver possession of the same to plaintiff on redemption and on what terms?

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In the first Court the Subordinate Judge saw no ground for holding that the mortgagees as such had acquired the occupancy rights in these Survey Numbers. He accordingly disallowed the claim, but observed that the plaintiff's claim to share in this land would have to be determined in the partition suit which was then pending apparently between the co-sharers in the mauza, in which the plaintiff was entitled to intervene as the owner of a one anna share.

The judgment of the Subordinate Judge on this point was reversed by the District Judge of Nimar who held that defendants 1 to 4 must surrender half the land as claimed by the plaintiff and account for half the profits, but that the plaintiff would have to bear half the costs of acquisition. The suit was remanded to ascertain the amount of the profits and costs of acquisition, and when the case came back, a decree was passed ordering the plaintiff to be put in possession of half the Survey Numbers, the claims of the 5th defendant, who had also acquired a one anna share from the mortgagor but had not appeared in the suit, being apparently overlooked. The District Judge's reasons are not very clear, but he referred to *Ram Brich Narain Singh* v. *Ambika Prasad Singh*,[4] and appears to have held on the authority of that decision, on which their Lordships have already commented, that, as the occupancy rights had been acquired by the predecessors of defendants 1 to 4 while they were mortgagees in possession of Rajaram's four annas share of the mauza, the mortgagor was entitled to them on redemption as an accession to the mortgaged property under S. 63 of the Transfer of Property Act. On a second appeal preferred by defendants 1 to 4 this contention was again put forward and was rightly rejected by the Judicial Commissioner of the Central Provinces who allowed the appeal and restored the judgment of the Subordinate Judge, holding that the surrenders of the respondents' occupancy rights had been obtained by the predecessors of defendants 1 to 4 as an accession to the proprietary interest which they claimed to have acquired in these Survey Numbers and not as mortgagees in possession of their mortgagor's four annas share.

In their Lordships' opinion these occupancy rights were acquired by the mortgagees of Rajaram's share, who were also

4. (1913) 17 C. W. N. 586.

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co-sharers with him in the mauza, for their own benefit, and to give the plaintiff any claim to them as the owner of a one anna share in the mauza it was incumbent on him to show that they were acquired under such circumstances as to bring them within the provisions of S. 90 of the Indian Trusts Act. No such case was set up in paragraph 10 and Schedule K of the plaintiff's rejoinder in which these occupancy rights are claimed as accretions to the suit mortgage, no issues have been framed in regard to it and it has not been considered or decided in the Lower Courts.

In their Lordships' opinion the plaintiff's appeal fails and should be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the first three respondents' costs including their costs of the proceedings of the 12th February, 1932, and of the petition for special leave to appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Douglas Grant and Dold.*

K. J. R./S. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

The Commissioner of Income-tax, Bengal .. *Appellant**

v.

Shaw, Wallace and Company .. *Respondents.*

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Income-tax Act (XI of 1922), Ss. 10 and 12—"Income"—Meaning of—Moneys received as compensation for loss of agency contracts, whether taxable as "income, profits or gains"—S 4 (3) (vii)—"Receipts arising from business"—Meaning of—Relevancy of English decisions on construction of Indian Act.

The English and Indian Income-tax Acts not being in *pari materia*, decisions of the English Courts are not, as a rule, useful guides on the construction of the Indian enactment.

The word "income" is not defined in the Indian Income-tax Act. It connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall.

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*P. C. Appeal No. 108 of 1931. 14th March, 1932.

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The words used in S. 2 (4) for defining business are, no doubt, wide but underlying each of those words is the fundamental idea of the continuous exercise of an activity and under S. 10, the profits, to be taxable, must be something earned by a process of production.

Sums received by the respondent firm, in the nature of a *solatium*, for the compulsory cessation of certain agency contracts, are not "income, profits or gains" arising from business *carried on by them*, and they are consequently not liable to be assessed to income-tax.

The expression "receipts arising from business" in clause (*vii*) of sec. 4, sub-sec. (3) of the Indian Income-tax Act, 1922, means "receipts arising from the *carrying on* of business". In re *Turner Morrison & Co., Ltd.*, (1928) I. L. R. 56 Cal. 211, dissented from.

Judgment of the High Court, Calcutta, reported in *Shaw, Wallace & Co.*, In re, (1931) I. L. R. 58 Cal. 1153, affirmed, but on different grounds.

Appeal No. 108 of 1931 from a judgment of the High Court, Calcutta, dated the 13th January, 1931, upon a reference of questions made to the High Court by the Commissioner of Income-tax, Bengal, under S. 66 (2) of the Indian Income-tax Act, 1922.

The question arising in this appeal was, shortly stated, whether a sum of Rs. 15,25,000 (less the admitted deductions) received by the respondent firm, who carry on a business of merchants and agents, as compensation for the termination of agencies for two oil-producing companies, should be taken into account in the computation of profits of their business, or whether such payment was in the nature of a capital receipt and therefore not liable to be brought into account as constituting "income, profits or gains" within the meaning of the Indian Income tax Act, 1922. The questions of law referred by the Commissioner and upon which the decision of the High Court was desired, are set out in the Board's judgment. The Court held, in agreement with the finding of the Commissioner, that the Rs. 15,25,000 were paid to the respondent firm as compensation for the loss of the agencies; but also held, in disagreement with his conclusion, that the amount was not "income, profits or gains" within the Act. From the said judgment of the High Court, the present appeal to His Majesty in Council was preferred by the Commissioner of Income-tax, Bengal.

Dunne, K.C. and *Reginald Hills* for appellant.

A. M. Latter, K.C. and *Cyril King* for respondents.

14th March, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—This is an appeal from a judgment of the High Court at Calcutta delivered on a reference made to it under S. 66 of the Indian Income-tax Act, XI of 1922. The reference arose out of an assessment to income-tax upon the respondents for the year 1929-30, in respect of an

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item of Rs. 9,83,361, part of a larger sum of Rs. 15,25,000 received by them in 1928 as compensation for the termination of certain agencies.

The respondents carry on business in Calcutta as merchants and agents of various companies, and have branch offices in different parts of India. For a number of years prior to 1928 they acted as distributing agents in India of the Burma Oil Company and the Anglo-Persian Oil Company, but had no formal agreement with either company. In or about the year 1927 the two companies combined and decided to make other arrangements for the distribution of their products. The respondents' agency of the Burma Company was accordingly terminated on the 31st December, 1927, and that of the Anglo-Persian Company on the 30th June following. Some time in the early part of 1928 the Burma Company paid to the respondents a sum of Rs. 12,00,000 "as full compensation for cessation of the agency," and in August of the same year the Anglo-Persian Company paid them another sum of Rs. 3,25,000 as "compensation for the loss of your office as agents to the Company." The quotations are from letters by which the payments were recorded, and are accepted on both sides as correctly expressing the nature of the transactions.

The Income-tax Officer, in computing the assessable income of the respondents for the relevant year, took these two receipts into account as profits or gains of their business in the year ending the 31st December, 1928, but allowed certain deductions therefrom in respect of compensation paid by the respondents to various employees, leaving a balance of Rs. 9,83,361 which he included in the total income of the respondents found assessable for the year 1929-30.

The respondents objected to the assessment, and appealed to the Assistant Commissioner, who confirmed the assessment. Thereafter, on the requisition of the respondents, the Commissioner drew up a statement of the case, and referred the questions of law therein set out to the High Court with his own opinion thereon, which was against the contentions of the respondents.

The questions so formulated were as follows :—

(*a*) Was not the sum of Rs. 9,83,361 which had been included in the total income of the assessees for purposes of assessment for 1929-30, in the nature of a capital receipt and therefore not income, profits or gains within the meaning of the Income-tax Act ?

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(*b*) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed under either of the sections 10 and 12 of the Act, inasmuch as (1) it was not the profits, or gains of any business carried on by the assessees within the meaning of section 10 of the Act, nor (2) income, profits or gains from other sources within the meaning of section 12 of the Act?

(*c*) In the alternative, was not the payment of Rs. 9,83,361 an *ex gratia* payment in the nature of a present from the oil companies in question and was it not therefore exempt under section 4 (3) (*vii*) of the Act?

The reference was heard by the Chief Justice sitting with Ghose and Buckland, JJ. The judgment of the High Court was delivered by the Chief Justice, his colleagues concurring.

The learned Judges appear to have returned a formal answer only to question (*a*) which the Chief Justice stated to be "the real question in the case." He thought that if the respondents could not escape by reason of the contention raised by this question they must fail. The other questions, he thought, fell within a recent decision of the Court in the case of In re *Turner Morrison & Co., Ltd.*[1]; he had nothing to add to what was then said on these points.

Their Lordships agree that the real matter for decision falls under (*a*), but they think that this question is not happily worded, as it seems to suggest that it was only if the sum there referred to was "in the nature of a capital receipt" that it would be exempt from assessment, whereas the more correct proposition would seem to be that it was only if it was in the nature of an income receipt that it would fall to be assessed to the tax. The question was, however, re-stated by the learned Chief Justice in more precise terms, viz., "whether these sums are income, profits or gains within the meaning of the Act at all," and for the reasons stated in his judgment he came to the conclusion that they were not. Their Lordships think that his conclusion was right though they arrive at this result by a slightly different road.

In one part of his judgment the Chief Justice seems to hold that the "compensation for loss of these agencies is a receipt in respect of a capital asset in the nature of goodwill," but it has been objected with some force that there is nothing upon which this finding can be based. There was, so far as the facts disclose, no transfer of the goodwill of the respondents, and no agreement by them not to compete with the new selling agency of the companies.

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In another part of the judgment the payment seems to be regarded as in the nature of compensation in lieu of notice. But here again their Lordships think that there are no facts to support such a conclusion, and they doubt if S. 206 of the Indian Contract Act upon which reliance is placed has any application.

Again their Lordships would discard altogether the case-law which has been so painfully evolved in the construction of the English Income-tax Statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not *in pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations.

The object of the Indian Act is to tax "income," a term which it does not define. It is expanded, no doubt, into "income, profits and gains," but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital". But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production.

The sources from which the taxable income under the Act are to be derived are enumerated in S. 6, which runs as follows:—

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

(*i*) Salaries.

(*ii*) Interest on securities.

(*iii*) Property.

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(*iv*) Business.
(*v*) Professional earnings.
(*vi*) Other sources.'

The claim of the taxing authorities is that the sum in question is chargeable under head (*iv*) Business. By S. 2 (4) business "includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture." The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under S. 10 the tax is to be payable by an assessee under the head business "in respect of the profits or gains of any business *carried on by him*". Again, their Lordships think, the same central idea: the words italicised are an essential constituent of that which is to produce the taxable income: it is to be the profit earned by a process of production. And this is borne out by the provision for allowances which follows. They include rent paid for the premises where the business is carried on; the cost of current repairs in respect of such premises; interest on money borrowed for carrying on the business, etc.

Some reliance has been placed in argument upon S. 4 (3) (*v*) which appears to suggest that the word "income" in this Act may have a wider significance than would ordinarily be attributed to it. The sub-section says that the Act "shall not apply to the following classes of *income*," and in the category that follows, clause (*v*) runs:

"Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund."

Their Lordships do not think that any of these sums, apart from their exemption, could be regarded in any scheme of taxation as income, and they think that the clause must be due to the over-anxiety of the draftsman to make this clear beyond possibility of doubt. They cannot construe it as enlarging the word "income" so as to include receipts of any kind which are not specially exempted. They do not think that the clause is of any assistance to the appellant.

Following the line of reasoning above indicated, the sums which the appellant seeks to charge can, in their Lordships' opinion, only be taxable if they are the produce, or the result, of carrying on the agencies of the oil companies in the year in which they were received by the respondents. But when once

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it is admitted that they were sums received, not for carrying on this business, but as some sort of *solatium* for its compulsory cessation, the answer seems fairly plain.

If the business had been sold—even if that somewhat indeterminate asset known as the "goodwill" had been assigned to the employing companies, as the High Court seems to have thought it had—it is conceded that the price paid would not have been taxable. But why? Plainly because it could not be regarded as profit or gain from carrying on the business, and their Lordships think that the same reasoning must apply when the sum received is in the nature of a *solatium* for cessation.

It is contended for the appellant that the "business" of the respondents did in fact go on throughout the year, and this is no doubt true in a sense. They had other independent commercial interests which they continued to pursue, and the profits of which have been taxed in the ordinary course without objection on their part. But it is clear that the sum in question in this appeal had no connection with the continuance of the respondents' other business. The profits earned by them in 1928 were the fruit of a different tree, the crop of a different field.

For the reasons given their Lordships are of opinion that question (*a*) was rightly answered by the High Court in favour of the assessee. No objection has been taken to the form of the answer or to its sufficiency, and it would seem unnecessary therefore to deal with the other two questions. Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (*vi*) "Other sources" and the corresponding provisions of S. 12.

With regard to the claim to exemption under S. 4 (3) (*vii*), their Lordships think that the decision in the case of In re *Turner Morrison & Co., Ltd.*[1] to which reference has been made above, may need re-consideration in the light of this judgment. In their Lordships' view the expression "receipts arising from business" in that clause must mean receipts arising from the carrying on of business.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respondents : *Linklaters and Paines.*

K.J.R./S. R. *Appeal dismissed.*

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1. (1928) I. L. R. 56 C. 211.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

The Official Liquidator of M. E. Moolla Sons, Limited .. *Appellant**

v.

Mrs. Perrin R. Burjorjee .. *Respondent.*

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The Official Liquidator of M. E. Moolla Sons, Ltd. *v.* Mrs. Perrin R. Burjorjee.

Indian Registration Act (XVI of 1908), S. 49—Plea of non-registration raised for the first time before the Privy Council—Unregistered agreement for sale of immoveable property—Personal claim for damages for breach of contract, not precluded by S. 49—Proceeding not affecting any immoveable property—Admitted document—No duty of Court to take notice of non-registration.

A question of law relating to the admissibility of a document by reason of its non-registration cannot for the first time be allowed to be raised in a court of last resort when the plea cannot be disposed of without deciding nice questions of fact on which the evidence is not clear and the parties are at variance. Observations of Lord Watson in *Connecticut Fire Insurance Company* v. *Kavanagh*, (1892) A. C. 473 at 480, referred to and applied.

An agreement for sale of immoveable property recited the payment of earnest money and provided that the balance of the purchase money should be secured by an equitable mortgage of the said property, *i. e.*, by the purchaser depositing the title deeds with the vendor. The purchaser having refused to complete the sale, the property was sold, and the vendor sought to prove in the winding-up of the purchaser-company for damages for breach of contract.

Held, (leaving open the question whether the agreement of sale required registration) that the non-registration of the agreement did not preclude the vendor, under S. 49 of the Registration Act, from putting forward a personal claim for damages under the agreement.

Held, further, on the evidence, that in the aforesaid agreement of sale entered into by one Moolla in his own name, the appellant-company was the undisclosed principal of Moolla and was consequently liable under the agreement.

Section 49 of the Registration Act does not make it obligatory on the Court to take notice of the non-registration of an *admitted* document, at any rate in a proceeding not affecting immoveable property.

Appeal No. 96 of 1931 from a judgment of the High Court, Rangoon, dated the 4th August, 1930, in its Appellate Jurisdiction, reversing a judgment of the same Court, on its Original Side, dated the 23rd December, 1929.

The question for determination on the appeal was whether the respondent was entitled to rank as a creditor in the liquidation of the appellant-company.

The facts of the case appear sufficiently fully from their Lordships' judgment.

The appellant, in his petition to the High Court for leave to appeal and in his printed case before the Board, took for the

*P. C. Appeal No. 96 of 1931. 3rd March, 1932.

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first time the objection that the agreement of sale, dated the 27th July, 1921, upon which the respondent based her claim for damages, was not registered and was thereby invalid and inoperative. The material terms of the agreement are set out *in extenso* in the Board's judgment.

Upjohn, K. C. and *T. B. W. Ramsay, M.P.*, for appellant.

Dunne, K. C. and *A. Pennell* for respondent.

3rd March, 1932. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.

On the 23rd December, 1929, the Trial Judge on the Original Side of the High Court of Judicature at Rangoon held that the proof was rightly rejected. On the 4th August, 1930, this decision was reversed on appeal to the Appellate Side of the Court.

The proof in question was for Rs. 63,219-15-0, damages alleged to have been incurred by the respondent by reason of the failure of the Company to complete the purchase of property agreed to be sold by the respondent by an agreement, dated the 27th July, 1921.

The only question in issue or debated at the hearing before the Trial Judge, or on the appeal, was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the Company was the undisclosed principal of Moolla in respect of such agreement.

The Trial Judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefit of it to the Company and that therefore the Company was under no liability to the respondent.

The Appellate Court held that the Company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected.

Against this decision the liquidator appealed to His Majesty in Council and before their Lordships' Board raised the contention that the agreement of the 27th July, 1921, required registration under the Indian Registration Act, that it had not been registered and that as it had not been registered it

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could not be used for any purpose whatever and ought to be ignored by the Court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail.

The questions therefore which arise for their Lordships' consideration are:

(1) Ought the appellant to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement?

(2) If the question as to registration can now properly be raised (*a*) did the agreement, which admittedly was not registered, require registration, and (*b*) if it did require registration, what is the effect of non-registration in regard to the respondent's right to claim damages under the agreement?

(3) If the question as to registration cannot now be properly raised, or if it can be properly raised but upon consideration of the merits of the question, it is held that the non-registration of the agreement does not preclude the respondent from putting forward a claim for damages under the agreement, whether the Company was or was not the undisclosed principal of M. E. Moolla in regard to the agreement?

To enable these questions to be considered, it will be convenient to state the facts so far as they are proved or admitted.

The Company was formed under the Indian Companies Act, 1913, on the 21st January, 1921, as a private company.

Clause III (6) of the Memorandum of Association enabled the Company to acquire by purchase, lease, exchange or otherwise land, buildings, and hereditaments of any tenure or description in Burma.

By Articles of Association 115 and 116 (2) the directors had power to purchase for the Company any property which the Company was authorised to acquire.

At a meeting of the Board of Directors held on the 1st February, 1921, Moolla was appointed Managing Director, with power to manage the business of the Company as he thought fit.

He was further authorised to purchase and sell any property (moveable or immoveable) as he thought best in the interest of the Company.

The issued share capital of the Company stood as to about 90 per cent. thereof in the name of Moolla, and as to the

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remainder in the name of his mother Mariam Bee Bee. The Trial Judge said "the Company was essentially a one man Company, being for all practical purposes Moolla incorporate."

The Company's office was also Moolla's office.

The agreement of the 27th July, 1921, was made between the respondent (described as the vendor) and Moolla (described as the purchaser) and contained no reference to the Company. Omitting formal parts, the agreement was as follows:—

"1. The vendor agrees to sell to the purchaser and the purchaser shall purchase from the vendor the properties described in the schedule hereinunder written measuring 12·54 more or less at or for the price of Rs. (Twelve thousand five hundred) per acre.

"2. That the purchaser had paid to the vendor Rs. (10,000) Ten thousand as earnest money, the receipt of which the vendor doth hereby acknowledge.

"3. That the purchaser agrees to complete the conveyance within three months from the 12th July, 1921, by paying the balance of the purchase money calculated at the rate aforesaid save and except a sum of Rs. (1,00,000) One hundred thousand which sum is to remain outstanding as in the clause next provided.

"4. The vendor agrees to keep the said balance of unpaid purchase money, namely, Rs. (1,00,000) One hundred thousand invested with the purchaser for a period not exceeding three to five years as the purchaser may wish on the purchaser paying interest thereon at the rate of eight per cent. per annum payable monthly and the same secured by the equitable mortgage of the premises hereby agreed to be sold, that is, by the purchaser depositing the title deeds of the said premises including the conveyance in his favour with the vendor.

"5. That the vendor shall make out a good and clean title to the said premises and produce for inspection the title deeds as soon as required by the purchaser."

The schedule contained a description of certain immoveable property in Burma belonging to the respondent. The acreage is given as 12·54 acres and on this basis the total purchase price under the agreement would be Rs. 1,57,375. Upon the execution of the agreement Rs. 10,000 was paid to the respondent as earnest money.

The respondent had no personal contact with Moolla in connection with the negotiation for or the execution of the agreement. She acted by brokers throughout.

On the 31st December, 1921, the Board of Directors held a meeting, the Minutes of which state that "the following properties were purchased by the managing director during the course of the year on behalf of the Company." A list of twenty-eight properties follows. The second on the list under date, 13th July, 1921, is the property, the subject of the agreement of the 27th July, 1921.

Of the twenty-eight properties in the list, twenty-five had been bought in the name of the Company, three properties (including the respondent's property) had been purchased in Moolla's name and admittedly the two properties other than the respondent's property had been purchased on the Company's behalf.

On the 30th March, 1923, the purchase being uncompleted, the respondent's brother-in-law wrote to Moolla, asking for the balance of the purchase-price, or at least Rs. 15,000.

Moolla replied by executing four promissory notes in the respondent's favour, for a total of Rs. 40,000.

On the 20th November, 1923, the respondent gave to Moolla a receipt for Rs. 1,000 in respect of interest.

Further payments of interest were made up to February, 1927, but the purchase was never completed.

Moolla at the trial admitted that Rs. 15,000 in respect of the promissory notes and all interest was paid out of the Company's funds. He alleged that the earnest money was paid by himself but refunded to him by the Company. He stated that all the Company's books prior to 1924 were destroyed under his instructions, and that he had no books to show that the earnest money came originally out of his own moneys. He alleged that he had purchased the property on his own account and had subsequently transferred the benefit of the agreement to the Company. He produced no document to evidence the alleged transfer.

On the 6th April, 1927, a creditors' petition was presented to wind up the Company, and an order for winding up was made on the 21st June, 1927, and one Hormasji was appointed liquidator.

Between the presentation of the petition and the making of the order, viz., on the 18th June, 1927, the respondent, at the instance of Moolla, filed in opposition to the petition, an affidavit prepared by Moolla's clerk. In this affidavit she stated that she was a secured creditor of the Company for Rs. 1,31,137-8-0. This was the sum then calculated to be owing under the agreement of the 27th July, 1921.

Moolla himself was declared insolvent on some date between April and June, 1927. His assets were practically nil. He did not enter the name of the respondent as a creditor in

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the schedule relating to his own affairs which it was his duty to file in the insolvency proceedings.

What subsequently followed is not clear.

The record before their Lordships' Board contains an affidavit sworn by the liquidator on the 17th February, 1928, on an application which he made to the Court for directions. This affidavit was treated as his evidence at the trial, and at the trial no oral evidence was given by him.

The affidavit, omitting formal parts, is in the following terms:—

"1. On 27th July, 1921, Mr. M. E. Moolla in his own name entered into an agreement with Mrs. P. R. Burjorjee for the purchase of 12 54 acres of garden land near the Victoria Lake on the terms contained in the deed of agreement, a copy of which is herewith attached and marked 'A'.

"The balance of the purchase price save Rs. 1,00,000 which was to lie invested with the purchaser was never paid and default was made in the payment of interest as stipulated in the agreement and consequently no conveyance was executed by the vendor.

"2. When the vendor applied persistent pressure and threatened to specifically enforce the agreement, Mr. Moolla in his own name on 1st April, 1923, executed four pro-notes for Rs. 15,000, Rs. 10,000, Rs. 10,000 and Rs. 5,000, towards the purchase price, out of which the first one for Rs. 15,000 was subsequently paid up in full.

"3. The payment of Rs. 10,000 on account of earnest money, of Rs. 15,000 in discharge of the pro-note for Rs. 15,000, dated 1st April, 1923, and of Rs. 41,409-12-0 on account of interest on the balance of purchase-price amounting in all to Rs. 66,409-12-0 was made from the funds of M. E Moolla Sons, Limited, on different dates as detailed in the list annexed and marked 'B'. The payments have been debited in the Company's books on the respective dates thereof.

"4. Throughout the correspondence, nothing is mentioned to show that Mr. Moolla was acting as the agent of the Company, except for some stray references in Mr. N. N. Burjorjee's letters and in the minutes of a meeting of the Directors held on 31st December, 1921, copies of which are herewith annexed and marked 'C' and 'D' respectively.

"5. According to Article 111 of the Company's Articles of Association, read with Minutes of Proceedings of meeting of Directors, dated 1st February, 1921 (of which copies are annexed marked 'E' and 'E-1') the Managing Director of the Company had power to purchase properties for and on behalf of the Comqany.

"The vendor has put in her proof of claim (copy annexed and marked 'F') in which she offers to take over the property at Rs. 4,500 per acre. She has subsequently put in a valuation certificate by Mr. Joakim, Managing Director of Balthazar & Son, Limited (copy annexed marked 'G'), stating that the present market value of the land is about Rs. 56,000. I have (without advertising) endeavoured unsuccessfully to obtain a better offer than that made by the vendor and from inquiries made and judging by a recent sale by auction of similar land in the neighbourhood, I have come to the conclusion that Rs. 56,000 is about as high a price as could possibly be realised for the land at the present time."

Of the exhibits referred to in the affidavit, Exhibit "A" was a copy of the agreement of the 27th July, 1921, Exhibit

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"B" was a statement printed in the record before their Lordships described as "Statement of payments made from the funds of M. E. Moolla Sons, Limited."

This statement purports to show payments made by the Company in respect of the agreement of the 27th July, 1921, to a total amount of Rs. 66,409-12-0 including Rs. 10,000 for earnest money paid by the Company on the 27th July, 1921 and Rs. 15,000 to satisfy one of the promissory notes given by Moolla, paid by the Company on the 7th July, 1923. The balance of the Rs. 66,409-12-0 was made up of interest payments in respect of the period between the 1st April, 1923 and February, 1927.

With regard to the Exhibits "C" and "D", reference has already been made to the material minutes of the directors' meeting. The only letter of the respondent's brother-in-law, N. N. Burjorjee, printed in the record, is one asking for payment of the Rs. 15,000 and carries matters no further.

Exhibits "E" and "E-1" dealt with the powers of the managing director to purchase immoveables, which have never been in dispute.

Exhibit "F" is not printed in the record, and the form of the respondent's proof is therefore not before their Lordships.

It is, however, reasonably clear from the affidavit (1) that the respondent had put in a proof of claim presumably on the same lines as that contained in her affidavit of the 18th June, 1927; (2) that for the purpose of minimising her claim to damages she had offered to take over the property at Rs. 4,500 per acre; (3) that the liquidator had neither admitted nor rejected her claim, but had applied to the Court for directions, putting in the agreement and pointing out that there was a question whether Moolla was principal or agent.

The printed extracts from the official diary of the proceedings in the winding up contains the following passage:—

"28th February, 1928.—Doctor for Mrs. Burjorjee, Munshi for Company. Clark for Chartered Bank. Official Liquidator in person.

"Let the property mentioned in the application of the official liquidator be sold by public auction after due advertisement, with a reserve price of Rs. 56,000. No orders will be passed on the present application of the official liquidator till after the sale, and his proposal will be sanctioned thereafter if Mrs. Burjorjee is still willing to abide by the terms of the arrangement.

"As regards Mrs. Burjorjee's claim against the Company, it will be enquired into by me on 12th March, 1928, unless before that date the official

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liquidator and Mr. Clark for the Company admit the claim. The sale may be held after the enquiry, and, if at the enquiry, I uphold Mrs. Burjorjee's claim, she will be given leave to bid at the auction and set off the purchase price against her claim *pro tanto*."

Their Lordships are informed and both parties are agreed that the property was in fact sold and the proceeds paid to the respondent.

Presumably it was sold under the order referred to in the extract from the diary. It is, however, obvious that no title could have been made without the concurrence of the respondent. An agreement of some kind between the official liquidator and the respondent in relation to the matter seems therefore to have been essential, though the appellant does not admit that there was any such agreement.

Having regard to the material before their Lordships' Board there may well have been such an agreement upon the lines that, the existence of an agreement for purchase at Rs. 1,57,375 and non-performance of that agreement by the purchaser being admitted, the parties arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent, the question whether the Company was the principal in respect of the agreement of sale being the only question left open for the decision of this Court.

However this may be, the respondent subsequently amended her proof by giving credit for the purchase money, her claim being thus reduced to Rs. 63,219-15-0.

On the 16th July, 1929, the official liquidator rejected the claim, giving the following reason :—

"I am not satisfied that the Company was the real contracting party. The contract is, therefore, not binding on and enforceable against the Company."

On the 29th July, 1929, the respondent petitioned to have the decision of the official liquidator reversed.

At the hearing of the petition the respondent gave oral evidence. Neither the official liquidator nor Moolla gave oral evidence. The affidavit of the official liquidator already referred to was treated as his evidence, and a deposition of Moolla made apparently at some earlier stage in the winding-up proceedings, was treated as his evidence.

In his evidence in chief, Moolla stated as follows :—

"I entered into the transaction with Mrs. P. R. Burjorjee as evidenced by the agreement of 27th July, 1921. When I agreed to buy this land, I was buying it at first for myself. I myself was the buyer. I signed the pro-notes which were given as part consideration of the purchase-price. The pro-notes were given in my own name and I paid Rs. 10,000 as earnest money and that was my own money. (Minutes of M. E. Moolla & Sons, Limited, dated the 31st December, 1921, explained to the witness.) I purchased that property and put it in the assets of the Company. From 31st December, 1921, it was considered as the property of the Company. The Directors of the Company agreed and as I did not want to sell the property I put it into the Company. The Company agreed to take it over in December, 1921. I presided at that meeting. Mariam Bee Bee is my mother. Hashim Ensoof Moolla is my brother's son (nephew). I held shares worth 1 crore and 53 lakhs and 50 thousand. The capital of the Company was 1 crore and 65 lakhs. My mother held shares worth Rs. 11,50,000. The minute was recorded at my suggestion. It was at my suggestion that the Company took over this deal. Apart from this minute there is no written document showing that this deal was taken over by the Company. The receipts made out by Mrs. Burjorjee were made out in my name."

In cross-examination Moolla said :

"I still say [*sic*] that the purchases by me of Mrs. Burjorjee's, Emin's and Bymeah's properties were for the Company. I don't remember whether I stated to Mr. Hormasji that the purchases made in my own name of Mrs. Burjorjee's, Emin's and Bymeah's lands were made for the Company.

* * * * *

"When the official assignee examined me I made the following statements:—'As for properties purchased by me in my own name after the promotion of the Company, they were treated as the Company's properties because the purchase-money or part purchase-money was paid from the Company and debited in the Company's accounts and they were bought for the Company. There are only two such properties, viz., Mrs. R. N. Burjorjee's land and the house in Park Road mortgaged to Emin. The Tiger Alley property, which has been sold, was another such transaction. I shall furnish lists in a day or two of all properties held for the Company though they are not in the Company's name."

In reply to the Court, Moolla subsequently added "as regards Mrs. Burjorjee's land it was in my own name and this was because Mrs. Burjorjee refused to negotiate with the Company."

Mrs. Burjorjee denied that she had refused to negotiate with the Company and said in effect that she only knew of the Company in the matter some time after the agreement.

The only matter debated before the Judge who tried the petition was the question of fact whether the Company was in connection with the purchase the undisclosed principal of Moolla. The learned Judge held that Moolla purchased on his own account.

The respondent appealed. The question, and the only question, debated before the Appellate Side was that which had been debated below.

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The Appellate Side reversed the Trial Judge and held that the Company was the principal in the matter.

Subsequently the appellant applied for a review of the judgment on the ground that Exhibit "B" to his affidavit had been erroneous in so far as it showed the earnest money to have been paid out of the Company's funds on the 27th July, 1921, the books of the Company for 1921 having been destroyed and there being, therefore, no evidence of such payment.

The application for a review of judgment was rejected.

On the 7th January, 1931, leave to appeal to His Majesty in Council was granted to the appellant. In his application for such leave, the appellant for the first time raised the question of the non-registration of the agreement in these terms: "This Honourable Court has omitted to take note of the fact that the agreement of sale of 27th July, 1921, had not been registered and was thereby invalid and inoperative." The same point was raised in his case before their Lordships' Board.

The first question for consideration, therefore, is ought the applicant to be allowed at this stage to raise for the first time the point of non-registration?

In *Connecticut Fire Insurance Company* v. *Kavanagh*[1] Lord Watson, in delivering the judgment of their Lordships' Board, said as follows :—

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea."

Section 49 of the Registration Act, which states the results of non-registration is, so far as material, as follows:—

"49. No document required by Section 17 to be registered shall—

"(a) affect any immoveable property comprised therein,

* * * * *

or

(c) be received as evidence of any transaction affecting such property . . . ., unless it has been registered."

1. (1892) A. C 473 at 480.

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Their Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non-registration.

They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement of the 27th July, 1921.

In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non-registration of the document.

It becomes therefore unnecessary to consider the second question as to the necessity for registration.

There remains the third and last question, one of fact upon which the Courts below have differed, viz., was the Company the undisclosed principal of Moolla in relation to the agreement of the 27th July, 1921.

Their Lordships are satisfied that the Company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct

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inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points strongly in the direction of his having acted as the Company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the Trial Judge. In their Lordships' opinion the learned Judges of the Appellate Side reached a correct conclusion upon the issue of fact.

In the result, therefore, the appeal fails and must be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Barrow, Rogers and Nevill.*

Solicitor for respondent : *J. E. Lambert.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Marina Narasanna and others .. *Petitioners** (*Accused*).

Narasanna, *In re.*

Criminal Procedure Code (V of 1898), *S.* 386 (1) (*a*)—*Hindu joint family property—Recovery of fine imposed on coparcener—Procedure—Civil Procedure Code,* 1908, *O.* 21, *R.* 47—*Applicability—Attachment of property—Claim by other members of family—Burden of proof.*

Where the undivided interest of a coparcener in moveable property belonging to a Hindu joint family is sought to be proceeded against to recover a fine levied by a Criminal Court, the proper procedure is that prescribed by O. 21, R. 47, Civil Procedure Code. The Court can either appoint a receiver or issue a prohibitory order in respect of the delinquent's share, but it cannot attach such property by way of seizure.

Juggomohun Bukshee v. *Roy Mothooranath Chowdry,* (1867) 11 M. I. A. 223, referred to.

Where certain items of family property are attached by a Criminal Court in order to recover a fine imposed on a coparcener, the *onus* rests on the persons claiming the property as joint to prove the same.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Rajahmundry in Mis. Case No. 8 of 1922 (C. C. No. 18 of 1932, Joint Magistrate's Court, Rajahmundry).

K. S. Jayarama Aiyar and *A. Lakshmayya* for petitioners.

The Public Prosecutor (L. H. *Bewes*) on behalf of the Crown.

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*Cr. R. C. No. 156 of 1932. 9th March, 1932.
(Cr. R. P. No. 144 of 1932.)

Narasanna, *In re.*

The Court made the following

ORDER.—This is a revision petition against the order of the Joint Magistrate of Rajahmundry in the matter of a claim put forward to certain properties seized under S. 386, Criminal Procedure Code. The accused's family originally consisted of seven brothers, one of whom is dead leaving children. One out of the six surviving brothers, the accused, was convicted and sentenced to a fine of Rs. 1,000. The Police seized and carried away certain movable properties. The brothers put in a claim. They alleged that the properties in C and D Schedules were the separate properties of two of the brothers, that those in E Schedule were the separate properties of the mother and that thosei n B Schedule were joint family properties. As regards the E Schedule properties the Lower Court found that the mother was no party to the proceedings and as none of the petitioners held a power-of-attorney for her they had no *locus standi* to complain of the proceedings as regards the said properties. As regards the properties in Schedules C and D which were claimed to be the separate properties of the petitioners, the Lower Court observed that no evidence in support of this allegation was produced and that the family being admittedly a joint one, the presumption is that these properties also were joint family properties. On this point an affidavit has been put in wherein it is stated:

> "Then the learned Magistrate posted the case for arguments on the question whether assuming the property is joint family property the seizure is or is not valid. Arguments were heard on this question on 12th February, 1932, on the distinct understanding that the evidence would be received on the question that the properties were the separate properties of the other members of the joint family after the decision on the preliminary point and the Lower Court posted the case to 17th February, 1932, for orders. On 17th February, 1932, orders were pronounced giving decision on all the points thereby depriving the petitioners of an opportunity to produce evidence to show that the properties were the separate property of the married brothers whose wives were given these properties by their parents."

It is quite natural that arguments should have been heard on the preliminary point assuming that the properties were joint family properties, so that, if it were held that the Court had no power to proceed against joint family properties evidence as to the properties being the separate properties of the claimants would become unnecessary. But it is difficult to believe that the Lower Court, having found that the Court could attach the right, title and interest of the convicted person in the joint properties, would have failed to receive evidence tendered

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that certain of the properties were not joint but separate properties of the claimants. However, in the view I am going to take on the matter, this will not assume much importance. There is no doubt, and it is not disputed on the other side, that since the decision in *Secretary of State for India* v. *Rangaswami Aiyangar*[1] the right, title and interest of a convicted person in the joint family properties can be attached. That decision no doubt was under S. 88, Criminal Procedure Code, but it has not been argued that the principle does not apply to S. 386 also. The real question in issue is whether such joint property can be attached by way of seizure. On this point the learned Joint Magistrate correctly observes that there is no direct authority. But he does not appear to me in his subsequent arguments to distinguish clearly between the method of attachment by seizure and attachment by prohibitory order or appointment of a receiver or whether attachment by seizure is permissible in cases of this sort. S. 386 of the old Code of 1882 ran:

"Whenever an offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender, although the sentence directs, that in default of payment of the fine, the offender shall be imprisoned."

In the new Code the section has been amended. The word "distress" has disappeared. It provides two ways for the Court to take action—either way may be employed against movable property but against immovable property only the second way. *Vide* S. 386 (1) (*a*) and (*b*). We are not concerned with S. 386 (1) (*b*) because it is not under that section that action was taken. S. 386 (1) says that the Court can issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender. It is pointed out for the petitioner that while in the old Code the warrant under S. 386 runs

"This is to authorise and require you to *make distress by seizure* of any movable property . . ."

the warrant in the amended Code runs

"This is to authorise and require you to *attach* any movable property . . . ."

and it is argued that the word "seizure" has been deliberately omitted. The definition of "distress" in Stroud's Judicial Dictionary has been quoted:

"A distress is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods as

1. (1916) I. L. R. 39 M. 831: 31 M. L. J. 84 (F. B.).

a pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally having been called a 'distress'; an inaccuracy which the older text-writers usually avoided."

I do not think this definition is particularly useful here, for admittedly even under the old Code this distress was by a process of law. In the Concise Oxford Dictionary "distress warrant" is described as warrant authorising distraint. The learned Joint Magistrate has relied on S. 88 and it has also been relied on before me. It is clearly, I think, permissible to look to S. 88 which lays down in some ways a more express procedure. We find in the amended Code sub-section (3) which runs:

"If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(*a*) by seizure; or

(*b*) by the appointment of a receiver; or

(*c*) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(*d*) by all or any two of such methods, as the Court thinks fit."

Here there are three distinct methods of attachment of which seizure is only one. The provisos which follow, 6-*a* and so forth, are modelled on the provisions for deciding claims to attached property made by third parties under the Civil Procedure Code. It is, therefore, I think quite proper to look to the Civil Procedure Code for assistance in this matter. S. 60, Civil Procedure Code, defines:

"Property liable to attachment and sale" and among such property is "movable property belonging to the judgment-debtor over which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf."

Of course there is no question that a share in movable property belonging to a joint family is property liable to be attached under this section. O. 21, R. 47 states:

"Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way."

On this Mulla remarks in his commentary:

"This rule is new. It provides for the attachment of a share or interest in movable property belonging to the judgment-debtor and others in co-ownership. Such a share or interest is obviously incapable of actual seizure, and provision has, therefore, been made for the issue to the judgment-debtor of a notice prohibiting him from transferring his share or interest in any way."

It is, therefore, clear that the proper mode of attachment under the Civil Procedure Code of the judgment-debtor's share

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in joint property is by way of prohibitory notice; and it is difficult to understand why any different principle should be applied when making an attachment under S. 386, Criminal Procedure Code, when in the analogous S. 88 the procedure for claims is practically in terms of the Civil Procedure Code. There is an interesting discussion in *Alagammal* v. *Sadasiva Padayachi*[2] as to the difference between attachment by a Civil Court and that by a Criminal Court; but what was in issue in that case was whether, when the property of an absconder had been attached under S. 88, the Government held it merely as his agent or had itself an interest in it. The learned Judges remark:

"We are clearly of opinion that the possession of the Government is not merely that of attaching decree-holder which was the view taken by the learned District Munsif. We are also clear that the possession of the Government is not that of an agent of the absconder."

What was held in that case was that the effect of S. 88 is to create an interest in the property and to entitle the Government to be in possession of the property and that the Government was a necessary party to the prior suit. This possession by Government only means, I think, the possession which the absconder would have had in the property. In *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry*,[3] which was a case under the Bengal Regulation corresponding to S. 88, Criminal Procedure Code, it was held that there could be no confiscation of property other than that of the delinquent. That was no doubt a case of confiscation, but it would seem to follow on the same principle that there can be no seizure of an interest in the property other than that of the delinquent. It has been pointed out also that S. 514 (3), Criminal Procedure Code, which deals with warrants for attachment to realise a security, states that the warrant "shall authorise the attachment and sale of any movable property". But, on the other hand, it is pointed out for the Crown that the form prescribed for this warrant, No. 52 runs:

"This is to authorise and require you to attach by seizure movable property belonging to the said . . . ."

While I do not think it is safe to rely too much on forms in the Appendix which are merely in the nature of general directions, I think there is considerable force in the argument

2. (1930) 60 M. L. J. 72. 3. (1867) 11 M. I. A. 223 at 238.

that the form under S. 386 has been deliberately altered apparently to correspond with the change in the wording of the section. On general principles also I consider that the Crown has no right to anything more in joint movable property than the delinquent himself had, and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is, I take it, that laid down in O. 21, R. 47, Civil Procedure Code. If necessary, either a receiver can be appointed for the delinquent's share, or a prohibitory order can be issued against him. His interest in the property can then be brought to sale. I would, therefore, hold that the attachment of the property in this case by way of seizure is wrong and that it should be proceeded against as laid down in the Civil Procedure Code, O. 21, R. 47. The properties seized including E Schedule properties should be meanwhile returned to the petitioners with a prohibitory order on the convicted accused.

As regards the onus of proof, the Lower Court has fallen into a natural error in making the presumption that the property is joint. After the ruling of the Privy Council in *Annamalai Chetti* v. *Subramanian Chetty*[4] it is clear that the burden of proving in an action for partition of joint family property that any particular item of property is joint primarily rests upon the plaintiff. However, I should hold in the present case, that, as the procedure which has been laid down in S. 88 must be followed in the absence of any special rules framed by Government under S. 386 (2), the onus in such a case should be regarded as lying in the same way as it does upon claimants to attached property under the Civil Procedure Code. That is to say, the mere fact of attachment throws the onus upon the claimants so that in the result the Lower Court was correct in throwing the onus of proof on the claimants. They should, however, be allowed to adduce evidence as to the separate possession of Schedules C and D property and on that evidence the Court will pass final orders. The order as regards Schedule E properties is upheld in so far as the decision that they are joint family properties is concerned.

B. V. V.　*Order modified.*

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4. (1928) 56 M. L. J. 435 at 440 (P. C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Cheena Pena Rena Perianan Chetti .. *Petitioner** (*Plaintiff*)

v.

Taluk Board, Devakottah, through its President, holding its office within the Devakottah Union Board limits .. *Respondent* (*Defendant*).

Perianan Chetti *v.* Taluk Board, Devakottah.

Madras Local Boards Act (*XIV of* 1920), *S.* 93—*Profession tax—Taluk Board's right to assess persons, how far—Person residing within limits of Taluk Board but doing business elsewhere—Income derived from business—Whether assessable to profession tax on the entire profits derived from business.*

Where a person had a money-lending business at Rangoon but resided within the limits of the Taluk Board of Devakottah and the Board sought to assess him on the whole of the income derived by him from his business at Rangoon,

Held, that he was assessable to profession tax by the Board and that he was assessable only on that part of his profits that reached him at Devakottah.

Board of Revenue, Madras v. *Ramanadan Chetty,* (1919) I. L. R. 43 Mad. 75: 37 M. L. J. 663 (S.B.) and *The Aurangabad Mills, Ltd.,* In re, (1921) I.L.R. 45 Bom. 1286, relied on.

Sundar Das v. *The Collector of Gujrat,* (1922) I. L. R. 3 Lah. 349 (F B.), distinguished.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Devakottah, dated 16th July, 1927, in S. C. S. No. 668 of 1926.

A. Swaminatha Aiyar for petitioner.

K. Rajah Aiyar for respondent.

The Court delivered the following

Waller, J.

JUDGMENTS. *Waller, J.*—The petitioner, who was the plaintiff in the suit, has a money-lending business at Rangoon, but resides within the limits of the Taluk Board of Devakottah. The dispute between him and the Board is as to his liability to pay the profession tax. The Board seeks to assess him on the whole of the income derived by him from his business at Rangoon. His first contention is that he is not assessable at all, as income cannot be received as income more than once. Alternatively, he pleads that, in any event, he cannot be assessed

*C. R. P. No. 1833 of 1927. 3rd March, 1932.

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on more than that part of his income which has been remitted to him from Rangoon.

In regard to his first contention, several decisions in income-tax cases have been cited. Two of them are in his favour. The first is *Sundar Das* v. *The Collector of Gujrat*[1]. The assessee had accumulated in Baluchistan, where no income-tax is leviable, except on salaries, his profits from military contracts until they amounted to over Rs. 23 lakhs. In 1919-20 he transmitted—by what means does not appear—this large sum of money to the Punjab, where the Collector sought to assess it to income-tax. On a reference to the Chief Court, it was held that the money could not be treated as income received in the Punjab, as it had already been received as income in Baluchistan. With great respect, I do not understand the *ratio decidendi* in the case or how income received in an area where it is free from income-tax cannot, when it is transferred to another area where it is liable to the tax, be treated as having been received there as income within the meaning and intendment of the Income-tax Act. The leading case on the point in Madras is *Board of Revenue, Madras* v. *Ramanadan Chetty*[2]. In that case, it was sought to assess to the tax the whole income derived by a person resident in the Madras Presidency from a business conducted on his behalf outside British India. It was decided that the income was not assessable, as no part of it had reached British India. Obviously, if any part of it had reached British India, that part of it would have been held to be taxable. On that ruling, the assessee in *Sundar Das* v. *The Collector of Gujrat*[1] would have been liable to tax. However, one of the learned Judges observed that the Madras case was distinguishable, though he did not say how. The truth, I think, is that Sundar Das's was a hard case, in which it was sought to assess as the income of one year the accumulated income of years. The Act then in force made no provision for cases of that nature. The present Act does; it exempts from the tax all but the accumulated income of the last three years. In an earlier case from Bombay in *The Aurangabad Mills, Limited, In re*[3] the question was whether the whole income of a company, which worked and earned its profits outside British India but

1. (1922) I.L.R. 3 Lah. 349 (F.B.).
2. (1919) I.L.R. 43 Mad. 75: 37 M.L.J. 663 (S.B.).
3. (1921) I.L.R. 45 Bom. 1286.

Periaman Chetti v. Taluk Board, Devakottah.

Waller, J.

had its head office in Bombay could be assessed to the tax in Bombay. The question was answered in the negative, but it was admitted on behalf of the company that, if its profits had been transmitted to Bombay, they would have been taxable. The same question was raised in Madras and decided in *The Secretary, Board of Revenue, Income-tax, Madras* v. *The Ripon Press*[4] in the same way. *Sundar Das* v. *The Collector of Gujrat*[1] was referred to with approval by one of the three Judges, Coutts Trotter, J., but the question referred to the Bench was not whether income could be received twice as income, but whether the income of a company which was received outside British India could be taxed in British India, whether it was received there or not. Sir Walter Schwabe said in his judgment:

"Except for the small amount received as the Company's money by the company in Bellary, there is no income which accrues or arises or is received in British India."

He was of opinion, I infer, that the Company's money received in Bellary was income received by it in British India, but the assessability of that income was not the question then in issue. In a later passage he referred to *Sundar Das* v. *The Collector of Gujrat*[1] ruling and said that he mentioned it "because that is a point which may be involved in the event of the question being referred to the Court whether such amounts received by the Company, as stated by me above, in Bellary, are themselves liable to taxation or not."

It seems to follow that what Coutts Trotter, J., had to say about *Sundar Das* v. *The Collector of Gujrat*[1] was entirely *obiter*. The last case cited was *Sir Saiyid Ali Imam* v. *The Crown*,[5] which followed *Sundar Das* v. *The Collector of Gujrat*[1] and assumed that it had been approved by the Bench in *The Secretary, Board of Revenue, Income-tax, Madras* v. *The Ripon Press*.[4] As I have already pointed out, the question did not arise in the latter case and all that Sir Walter Schwabe said was that the Lahore ruling would have to be considered in relation to it, if and when it did arise. It seems to me that the law was correctly stated in *Board of Revenue, Madras* v. *Ramanadan Chetty*[2] and that the admission made on behalf

1. (1922) I.L.R. 3 Lah. 349 (F.B.).
2. (1919) I.L.R. 43 Mad. 75 : 37 M. L. J. 663 (S. B.).
4. (1923) I.L.R. 46 Mad. 706 : 44 M.L.J. 523 (S. B.).
5. (1924) I.L.R. 4 Pat. 210.

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of the company in *The Aurangabad Mills, Limited, In re*[3] was in accordance with it. The first contention therefore fails.

The second contention and the claim of the Board raise the real question at issue: On what should the petitioner be taxed—on his total income, wherever it may have accrued to him, or on that part of it which reached him at Devakottah. The answer to those questions is, I think, to be found in the wording of S. 93 of the Local Boards Act (XIV of 1920). The petitioner is a person who "within such area (that is within the area of the Taluk Board, Devakottah).......is in receipt of '*an income*' from any source other than houses and lands inside the local limits" of that area. The plain meaning of the section seems to be that that part of his income is chargeable which he actually receives within the area of the Taluk Board. A different conclusion was arrived at in *Mahadeva Sastri* v. *The Municipal Council, Kumbakonam*[6] but that was a case governed by a different Act. What, in effect, the Judges then held was that being in receipt of a pension in a certain area meant the same thing as being a pensioner residing in that area. If the Act meant that, it might have said so. When it spoke of receiving a pension in a certain area, it did not mean receiving a pension outside it. I find that the petitioner is assessable only on that part of his profits that reached him at Devakottah and that his tax, on that basis, is Rs. 18. He will get a decree for Rs. 142. The parties will pay and receive proportionate costs on that amount throughout.

Krishnan Pandalai, J.—I agree.

Revision allowed.

K. C.

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3. (1921) I.L.R. 45 Bom. 1286.

6. (1913) M.W.N. 935.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Gangjee Premjee and Company through its partner Devshi Munji .. *Petitioner** (*7th Respondent-Alienee*)

v.

O. L. K. K. N. Firm, Colombo, consisting of partners Kannappa Chettiar and others .. *Respondents* (*Petitioners and Respondents* 1 *to* 6).

Gangjee Premjee & Co. *v.* O. L. K. K. N. Firm, Colombo.

Provincial Insolvency Act (*V of* 1920), *S.* 78—*Creditor's insolvency petition—Excusing delay—Limitation Act,* 1908, *S.* 5—*Applicability—Distinction between "petition" and "application".*

A creditor's insolvency petition praying that a debtor may be adjudged insolvent is not an application within the meaning of S. 78 of the Provincial Insolvency Act and the provisions of S. 5 of the Limitation Act cannot be applied to such a petition.

Distinction between "petition" and "application" pointed out.

Vaithinatha Aiyar v. *Vaithinatha Aiyar,* (1931) 61 M. L. J. 544, approved.

Petition under S. 75 of the Provincial Insolvency Act praying the High Court to revise the order of the District Court of Ramnad at Madura, dated 17th September, 1930, and made in C. M. A. No. 78 of 1929 (I. A. No. 103 of 1929 in I. P. No. 34 of 1928 on the file of the Court of the Subordinate Judge of Ramnad at Madura).

K. Rajah Aiyar and *V. Ramaswami Aiyar* for petitioner.

B. Sitarama Rao, S.R. Muthuswami Aiyar and *S. Panchapagesa Aiyar* for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—This Civil Revision Petition relates to a creditor's insolvency petition presented to the Subordinate Judge of Ramnad. That petition alleged a preferential transfer as the act of insolvency necessary to support it; but the date of that transfer according to the document representing it was more than three months before the date on which the insolvency petition was presented. So with their insolvency petition the creditors presented a petition to excuse the delay under S. 5 of the Limitation Act. That petition the Subordinate Judge dismissed. On appeal the District Judge, feeling himself bound by the decision of a Bench of this Court in A. A. O. No. 523

* C. R. P. No. 1434 of 1930. 25th November, 1931.

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of 1925, held that S. 5 of the Limitation Act applied to the case and reversed the Subordinate Judge's order and remanded the petition to excuse the delay for fresh disposal. The present Civil Revision Petition is preferred by the transferee concerned against the District Judge's remand order.

It was decided by a Full Bench of this Court in *Lingayya* v. *Chinna Narayana*[1] before the present Provincial Insolvency Act of 1920 came into force, that S. 5 and other general provisions of the Limitation Act did not apply to insolvency petitions. When the present Provincial Insolvency Act was enacted, a new provision was introduced in S. 78 of the Act, the opening words of which are:

"The provisions of Ss. 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act."

It is contended for the petitioning creditors in this case that under that provision S. 5 of the Limitation Act can be applied to their petition for the adjudication of the debtor. It will be noticed that the new provision in S. 78 of the Provincial Insolvency Act relates to appeals and applications only, as indeed does S. 5 of the Limitation Act. The petitioner before us, the transferee concerned, contends that a creditor's insolvency petition praying that a debtor may be adjudged insolvent is not an application within the meaning of S. 78 of the Provincial Insolvency Act. In considering that question I think in the first place we have to remember that S. 5 of the Limitation Act is in itself an exception to S. 3 of that Act, which directs that suits, appeals and applications presented after the expiry of the periods of limitation prescribed shall be dismissed, and being a provision enacting an exception to a general rule it has to be strictly construed. And in the same way S. 78 of the Provincial Insolvency Act, so far as it applies to S. 5 of the Limitation Act, must also be strictly construed. Remembering that, does the word "application" in S. 78 of the Provincial Insolvency Act include insolvency petitions, *i. e.*, petitions praying that a debtor may be adjudged insolvent?

Speaking generally, I do not think we can say that in legal phraseology a petition is not an application. Mr. Sitarama Rao for the creditors has pointed out to us that the words are in legislation applicable to this country often interchange-

1. (1917) I.L.R. 41 M. 169: 33 M. L. J. 566 (F. B.).

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able. In the Limitation Act it must be noticed that there is no reference to petitions at all, although it cannot be supposed that there is no law of limitation applicable to petitions. Petitions, so far as they are governed by the Limitation Act, are included in the word "applications". Sections 8, 9 and 10 of the Guardians and Wards Act show that an "application" may be a petition. Under S. 8 the Court may be moved to appoint a guardian by an "application" and under S. 10 the "application" may be made by a "petition". And, what is perhaps even more interesting for our purpose, as Mr. Sitarama Rao has been able to point out, in S. 55 of the Code of Civil Procedure, the expression "apply to be adjudged an insolvent" appears in sub-sections (3) and (4). Therefore, speaking generally in regard to the Acts applicable to this country, I think it is impossible to say that there is any necessary distinction between an application to a Court and a petition to a Court. For the convenience of the organisation of Court records and general administration there are certain rules in force in this Presidency that the term "petition" shall be used for what may be called originating motions, either in execution or otherwise, and that the term "application" shall be used for motions made in pending proceedings. But in this Court itself that rule is not strictly followed. On the Appellate Side of the Court it is not followed at all, as we ordinarily call interlocutory applications in pending proceedings Civil Miscellaneous Petitions. But Mr. Rajah Aiyar for the petitioner here urges that, whatever may be the general practice either in Courts or in legislation in the use of these two words, "application" and "petition", in the Provincial Insolvency Act there is a very definite distinction drawn between them. He has been able to show us that in the Provincial Insolvency Act of 1920, as it was enacted, "petition" is used for either a debtor's or a creditor's insolvency petition, praying that the debtor may be adjudged insolvent, but is never used for any application to the Court in the course of insolvency proceedings already instituted. That "petition" should be used for an application praying that a debtor may be adjudged insolvent, which thereby institutes insolvency proceedings, and that all applications in pending insolvency proceedings should be described in the Act as "applications" appears to have been a deliberate choice of language. It becomes particularly remarkable when we look at Ss. 10 (2) and 52, in both

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of which the word "petition" and the word "application" occur, "petition" being reserved as elsewhere in the Act for a petition that the debtor be adjudged insolvent. Those two sections emphasise what appears to be a deliberate contrast in the use of the two words. In S. 6 (*f*) there is a small point which may be noticed. It is there stated that a debtor commits an act of insolvency if he "petitions" to be adjudged an insolvent. "Petitions" is an awkward and ugly word, not likely to have been used in place of the ordinary word "applies", unless there was some special reason for using it. And the reason appears to be that even in that statement the Legislature wished to maintain the distinction between a "petition" and an "application" which runs right through the rest of the Act.

That was the position in regard to the use of these words, as the Act stood when it was first enacted. It happens, however, that in 1926 a new S. 54-A was introduced in order to allow a creditor to prosecute a petition to have a transfer set aside under S. 53 or S. 54 of the Act if the Official Receiver declines to do so. In that new section the opening words are :

"A petition for the annulment of any transfer under Section 53, or of any transfer, payment, obligation or judicial proceeding under S. 54."

There we have for the first time in this Act the use of the word "petition" for something other than a petition that the debtor may be adjudged insolvent. The contrast between such a petition for adjudication and any other application to the Court, which had been maintained so far by the use of the two different words, "petition" and "application", was infringed when this amendment was introduced. Mr. Sitarama Rao for the creditors not unnaturally contends that the contrast on which Mr. Rajah Aiyar has based his argument here breaks down. It is a remarkable fact that "petition" was introduced in that way in the new section. But I think we must remember that what we are trying to do now is to interpret the word "application" as it appears in S. 78 of the Act. S. 78 of the Act was there when the Act was originally issued in 1920, and the fact that there was the marked contrast between the use of the word "petition" and the use of the word "application" when the Act was issued in 1920 is not destroyed by a different use of the word "petition" in the amendment introduced six years later. It has also been suggested by Mr. Rajah Aiyar that the word "petition" may have crept into this new amendment by

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oversight, the Legislature not remembering, when the amendment was made, that in this particular Act a distinction had been drawn between the use of the word "petition" and the use of the word "application". But I do not think we are entitled to attribute oversight to the Legislature unless that is clearly necessary. There are other explanations why a proceeding under S. 54-A of the Act, and so by implication a proceeding under S. 53 or S. 54 should be described as instituted by "petition" rather than by "application". If "petition" was reserved purposely by the Legislature for some motion originating proceedings, then it might well be used in connection with proceedings under Ss. 53 and 54, as, though connected with insolvency proceedings and possible only while insolvency proceedings are pending, they are really new proceedings originated against outside parties; and in that sense it is not inconsistent with the distinction which Mr. Rajah Aiyar wishes to draw between "petition" and "application" that such proceedings should be initiated by "petitions". And it may also be remarked that for such proceedings, so long as insolvency proceedings are going on, there is no period of limitation, and therefore the Legislature may even have used the word "petition" in S. 54-A advisedly, so as to make it clear that they are outside the scope of S. 78. On the whole I do not think that the use of the word "petition" in the new S. 54-A is sufficient to destroy the strong contrast maintained through the Act as originally framed between a "petition" praying that a debtor be adjudged insolvent and other applications made in the course of insolvency proceedings.

So much for the mere words used. But there may well be, as Mr. Rajah Aiyar suggests, good reason behind the choice of the word "application" rather than "petition" in S. 78. According to the scheme of the Act a petition praying that a debtor be adjudged insolvent initiates very important litigation. By S. 12 of the Act it is required that such a petition shall be signed and verified as if it were a plaint. And under S. 18 of the Act it is provided that the procedure in regard to the admission of plaints shall be applied to such petitions. Those two sections recognise that an insolvency petition, praying that a debtor be adjudged insolvent, is not only the beginning of very important litigation, but is of as much importance as a plaint. Indeed, as we know, it may often be of much more importance

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than a plaint: it may initiate something equal to a whole bundle of suits. If, as appears from these provisions of the Act, the Legislature intended an insolvency petition praying that a debtor be adjudged insolvent to be treated as a plaint in a suit, of as great importance as a plaint in a suit, then there would be good reason for using language which would make it clear that S. 5 of the Limitation Act, though being applied by the new S. 78 to other matters in connection with insolvency proceedings, that is to appeals and applications, should not be applied to initiating insolvency petitions. S. 5 of the Limitation Act, as is well known, has no application to suits. It does not give the Court any power to extend the period of limitation for instituting a suit; but it does give the Court power on sufficient cause to extend the time for filing an appeal or an application in litigation which has already been properly instituted by suit. When a party has come to Court with his suit in time, then he or other parties to the suit, who are conducting their proceedings under the control of the Court, are allowed to ask for extension of time under S. 5 of the Limitation Act, for sufficient cause, and the Court may grant such extensions at its discretion. But it is no part of the Limitation Act—indeed it is against the object of the Limitation Act—that the Court should have discretion to extend the periods of limitation for initiating suits. If the Court had power to do that, then one of the main objects of the law of limitation in giving security to titles would be defeated. And in the same way, if the Court had discretion to enlarge the time after an act of insolvency within which a creditor's insolvency petition must be filed, the security of many transactions might be imperilled. The acts of insolvency which may be used as one of the justifications for a creditor's petition include even the sale of property in execution of a decree. If a debtor's property is sold in execution of a decree, for three months after that is done, it is possible that a petition to adjudge him insolvent may be filed. But after that period other persons doing business with him know that that danger is gone. If the Court had discretion to extend that period of three months, very serious results to merchants and others dealing with a judgment-debtor might happen. It is, therefore, quite reasonable that, as S. 5 is not applicable to suits, so it should not be applicable to creditor's insolvency petitions.

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However the learned District Judge, as I have mentioned, felt that he was bound by the decision in A. A. O. No. 523 of 1925. And on that decision Mr. Sitarama Rao has relied before us. In that case no doubt the two learned Judges were of opinion that S. 5 applied to a creditor's petition to adjudge a debtor insolvent. The actual question before them was whether the refusal of the District Judge to apply S. 14 of the Limitation Act to such a petition was proper. They were of opinion that S. 14 of the Limitation Act did not apply to such an insolvency petition, and they dismissed the appeal before them. But in the course of their judgment they expressed the opinion that S. 5 of the Limitation Act may be applied to such insolvency petitions, though in the end they came to the conclusion that the circumstances of that case were not such as to justify the application of that section. I think that Mr. Rajah Aiyar is justified in saying that the expression of the learned Judge's opinion in that case to the effect that S. 5 of the Limitation Act applies to a creditor's insolvency petition was *obiter dictum.* And I may perhaps also remark with great respect that in that case the learned Judges did not find it necessary to discuss the wording of the Provincial Insolvency Act in the provisions concerned nor did they note the contrast between the use of the word "petition" and the use of the word "application", which I have mentioned. And it may be added that this Revision Petition comes before us because it has been referred to a Bench by Jackson, J., who delivered the judgment in A.A. O. No. 523 of 1925 and who it appears therefore does not himself regard that as a binding decision on the present question. On the other hand Cornish, J., in *Vaithinatha Aiyar* v. *Vaithinatha Aiyar*,[2] sitting alone decided that S. 5 of the Limitation Act did not apply to a creditor's insolvency petition. In my opinion Cornish, J.'s view on that matter should be followed. I may add that it has been pointed out to us that the only specific provisions regarding limitation in the Provincial Insolvency Act are contained in S. 68, relating to applications against orders made by Receivers, and S. 75, relating to appeals. It has been suggested that that may explain why it was thought necessary in S. 78 to refer only to appeals and applications. That also is an argument which, I think, supports the view I have taken regarding S. 5 of the Limitation Act.

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2. (1931) 61 M. L. J. 544.

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There was another part of Mr. Rajah Aiyar's argument with which I do not think I need deal in any detail on this occasion. He contended that S. 9 (1) (*c*) of the Provincial Insolvency Act, which provides that the act of insolvency on which the petition is grounded must have occurred, within three months before the presentation of the petition, does not prescribe any period of limitation within the meaning of S. 5 of the Limitation Act. If that is so, of course any other discussion of the question is unnecessary. His argument is that S. 9 does not provide a period of limitation but does by its wording provide a condition precedent, which must be fulfilled before a creditor can prefer an insolvency petition. That section lays down that a creditor shall not be entitled to present an insolvency petition against a debtor unless the debt is Rs. 500, unless it is a liquidated sum and unless the act of insolvency has occurred within three months. Now in form that section undoubtedly does not lay down any explicit rule of limitation. It does not say that, if the petition is not filed within a certain period, it shall be dismissed. In form and in language it does lay down three conditions precedent, as Mr. Rajah Aiyar contends. And I may mention that Mr. Rajah Aiyar's view that this section does not provide a period of limitation was adopted by Spencer, J., in *Aiyapparaju* v. *Venkatakrishnayya.*[3] But, although in form what we find in the section is a statement of conditions precedent and not a rule of limitation, as Mr. Sitarama Rao has pointed out, in effect we get to very much the same thing as a rule of limitation, namely that, unless a creditor files his petition within three months after the act of insolvency, it must be dismissed, which has just the effect of a rule of limitation. But I do not regard this question, whether S. 9 of the Provincial Insolvency Act does lay down a rule of limitation, as at all an easy one, and I do not wish to express any decided opinion upon it on this occasion. If we were to find that S. 9 of the Provincial Insolvency Act did not prescribe any period of limitation, then very serious consequences would follow. Among other things S. 14 of the Limitation Act would not affect such insolvency petitions by reason of S. 29 of the Limitation Act, as it might otherwise do. It is not necessary, I think, to go into this difficult question and its consequences on this occasion, as all that we are concerned

3. (1922) 44 M. L. J. 303.

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with now is the question whether S. 5 of the Limitation Act applies to a creditor's insolvency petition. And on that question I agree with Mr. Rajah Aiyar's contention that it does not apply.

In my opinion, therefore, this petition should be allowed with costs in this Court and the remand order of the learned District Judge should be set aside.

Anantakrishna Aiyar, J.—Certain creditors of a debtor filed a petition under the Provincial Insolvency Act to have the debtor adjudicated an insolvent on the ground that he had executed a mortgage in favour of some one creditor, alleging that the mortgage constituted a fraudulent preference under S. 54 of the Provincial Insolvency Act; but, as the date mentioned in the mortgage deed was beyond three months from the date of the petition, the petitioners applied to have the delay excused under S. 5 of the Limitation Act read with S. 78 of the Provincial Insolvency Act. The learned Subordinate Judge held that the Court had no jurisdiction to apply S. 5 of the Limitation Act to petitions under the Insolvency Act. He accordingly dismissed the petition. On appeal by the petitioning creditors, the learned District Judge reversed that decision and remanded the petition for rehearing on the merits whether there was sufficient cause to excuse the delay. He relied on the decision of a Bench of this Court in C. M. A. No. 523 of 1925 (*Peddapalli Samacharlu* v. *Yarrajinni Siddappa*) and held that S. 5 of the Limitation Act was applicable to a petition filed by a creditor under S. 9 of the Insolvency Act. The mortgagee has preferred this revision petition against the decision of the District Judge, under S. 75 of the Provincial Insolvency Act.

Mr. Rajah Aiyar, who appeared for the mortgagee, based his case on two grounds: (1) that S. 5 of the Limitation Act does not apply to the petition in question; and (2) that the period of three months mentioned in S. 9 of the Insolvency Act is not "a period of limitation" within the meaning of S. 5 of the Limitation Act, and consequently no question of limitation arises in the case, his contention being that after the expiry of three months, the transaction which would otherwise be available to ground the insolvency petition would not be available at all as such.

On the question whether S. 5 of the Limitation Act applies to the present case, it may be stated that under the previous

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Provincial Insolvency Act (III of 1907) it was held by a Full Bench of this Court in *Lingayya* v. *Chinna Narayana*[1] that the general provisions of the Limitation Act dealing with the admission of appeals and applications filed after the periods prescribed for the same could not be applied to extend the periods prescribed by the provisions of Act III of 1907 for filing of appeals, etc. The view of the Full Bench was that the Insolvency Act was a special Act complete in itself, and that the general provisions of the Limitation Act could not be held applicable to proceedings taken under that Insolvency Act. After that decision, S. 78 has been enacted in the present Provincial Insolvency Act of 1920 to the effect that the provisions of sections 5 and 12 of the Indian Limitation Act of 1908 shall apply to 'appeals and applications under the Insolvency Act'.

On behalf of the respondents, it was argued that the provisions of S. 5 of the Limitation Act should now be held to apply to the "petition" filed by the creditors under S. 9 of the Insolvency Act. Mr. Rajah Aiyar contended that S. 78 applies only to '*appeals*' and '*applications*' under the Insolvency Act, and that a "petition" under S. 9 is not "an application" but "a petition" under the Act. At first sight it appeared to me that the petitioner before us was trying to make too much out of the use of the two different words—"*petitions*" and "*applications*" in the Insolvency Act—and I was anxious to find out whether these words have any accepted definite legal signification, and whether the two words connote essentially different ideas. These words are not defined in the General Clauses Act, nor in the Code of Civil Procedure, the Limitation Act or in the Insolvency Act.

Referring to Wharton's Law Lexicon, I find the following:—"Application" is "a request, a motion to a Court or Judge; for the disposal of a thing."

As against 'petitions' it is stated "a supplication made by an inferior to a superior having jurisdiction to grant redress". It is further stated that "in Bankruptcy, proceedings are commenced by one or more creditors of the debtor filing a petition in the Court of Bankruptcy praying that the debtor may be adjudged bankrupt. Divorce, etc., proceedings are commenced by petition." Mention is also made of Election Petitions. The 'petitioning creditor' is said to be 'one who

1. (1917) I. L. R. 41 Mad. 169: 33 M. L. J. 566 (F. B.).

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applies for an adjudication in bankruptcy against his debtor'. It was contended by the learned advocate for the respondents that the word 'application' as used in the Insolvency Act has no technical meaning and that it is the same as 'petition' and he referred us to certain other enactments of the Indian Legislature. In S. 55, clauses (3) and (4), Civil Procedure Code, it is stated that the Court, before whom a judgment-debtor arrested in execution of a decree for money is brought, shall inform him that he may 'apply' to be declared insolvent. O. 45, R. 2 relating to appeals to the Privy Council, was also referred to, where the words used are "the appellant shall *apply* by *petition*". (The italics are mine.) Further, the provisions of the Guardians and Wards Act, Ss. 8 and 10, were also referred to. In S. 10 it is mentioned that "if the application is not made by the Collector, it shall be by petition, signed and verified etc." It is not necessary to examine how these words are used in other enactments by the Legislature, and whether each of these words has a definite well-recognized meaning, different from the other. No doubt in the Civil Rules of Practice framed by this Court for the guidance of the Lower Courts in the Presidency as to how proceedings should be marked for convenience and uniformity, a distinction has been made between a 'petition' and an 'application'; for example, between an 'execution petition' and an 'execution application', the latter phraseology being applied to the media by which further and other steps are sought to be taken in the main matter of execution and in a pending execution petition. But in construing an Act passed by the Indian Legislature, this practice in our Presidency should not be allowed to have any consideration at all. Again, as observed by the Privy Council in *Adamson* v. *Melbourne and Metropolitan Board of Works*[4] when a word has no definite and well understood legal signification, "it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature. *A fortiori* must it be so when resort is had for this purpose to the enactments of other Legislatures."

In the circumstances, it seems to me that we must, therefore, turn to the provisions of the Provincial Insolvency Act,

4. (1929) A. C. 142 at 147.

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1920, to find out whether any light is thrown on this matter by the provisions contained therein. On a reading of the several sections of the Act, one thing is clear that the Legislature in this Act has used the words 'petition' and 'application' intentionally *prima facie* differently. It is not necessary to refer to all the relevant sections. It is enough to refer among others to Ss. 7, 19, 20, 12 and 18 where the word 'petition' is used and to Ss. 27, 31, 35, 41, 68, where the term 'application' is used. We also find that the two terms are used side by side in each of the two sections, 10 (2) and 52. Schedule I also speaks of a 'petition' and of an 'application'. I do not propose to lay any emphasis on the rules framed by this High Court under the Act, where the words 'petition' and 'application' are used separately. *See* Rr. 5, 8, 14, etc., for example. The term 'petition' is apparently used in the Act to denote that by which the proceeding is inaugurated and begun; whereas the term "application" is used to denote that by which intermediate steps are taken in connection with an original proceeding. S. 18 enacts that the procedure laid down in the Code of Civil Procedure with reference to admission of plaints shall, so far as it is applicable, be followed in the case of insolvency petitions; and S. 12 enacts that

"every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure for signing and verifying plaints."

Having regard to the use of these two terms "petition" and "application" differently in the various sections of the Act, I am led to think that the two words have been used purposely to denote two different matters, and that S. 78 of the Provincial Insolvency Act which makes the provisions of S. 5 of the Limitation Act applicable to 'applications' under the Insolvency Act could not be called in aid in connection with 'petitions' under the Insolvency Act. Our attention was, however, drawn by the learned advocate for the respondents to the use of the word 'petition' in S. 54-A, which circumstance, he argued, is rather against this view. I am not sure that it is so. S. 54-A was added by Act XXXIX of 1926. The distinction between 'petition' and 'application' existed when the Act was passed in 1920. For the purpose of this Act, that distinction does not disappear by the enactment of S. 54-A, whatever light it may throw on the Act as a whole. It is possible that the word 'petition' was used in connection with

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S. 54-A purposely with a view to point out that proceedings contemplated under that section are to be treated as in the nature of original petitions and to be inquired into and tried accordingly, having regard to their importance and seeing that third parties are interested in the same; but, in any event, the use of the word 'petition' in S. 54-A is not, in my opinion, in any way conclusive to show that the words 'petition' and 'application' have been used indiscriminately in the Provincial Insolvency Act.

It should be noted that S. 5 of the Limitation Act does not apply to 'plaints' but applies only to 'appeals and applications'. It is clear, therefore, that the Court has no power under S. 5 to excuse delay in the filing of a 'plaint'. In cases of minority, fraud, etc., the period of limitation is extended and it is provided that there would be no limitation bar under the provisions of the Act if the necessary deductions on ground of minority, fraud, etc., be made, whereas under S. 5, the Court excuses the delay, having regard to the circumstances proved before it, holding that the proceedings are barred otherwise. Petitions filed by creditors under S. 9 of the Insolvency Act are substantially in the nature of plaints. If that be so, one can understand why the Legislature did not provide for the application of S. 5 to such petitions when it enacted S. 78 of the Act. *Prima facie* it would be strange that the Court which could not, under S. 5, excuse delay in filing a 'plaint' could excuse delay in the filing of an 'original petition', in respect of which, according to the assumption, a period of limitation has been prescribed. Thus, it would seem that the Legislature had a purpose in the use of the words 'petition' and 'application' in the material sections of the Provincial Insolvency Act, and it is not open to Courts, in the absence of clear and cogent indications in the Act to the contrary, to ignore the distinction made by the Legislature.

The learned advocate for the respondents relied on the decision of a Bench of this Court in C.M.A. No. 523 of 1925, decided by Devadoss and Jackson, JJ. The question for decision in that case was whether the petitioning creditor was entitled to the deduction of the time during which the petition filed by him was pending in a Munsif's Court, which had no jurisdiction to entertain that petition. While holding that S. 14 did not apply, the learned Judges were of opinion that S. 5 would apply, and

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holding that no sufficient cause for not making the application earlier had been shown, they dismissed the petition on the merits. That decision is entitled to great weight, and ordinarily, another Bench would follow the same. But reading the judgment of the learned Judges, it will be seen that the various provisions of the Insolvency Act where the words 'petition' and 'application' are used have not been noticed, nor does the judgment discuss the real nature of the creditor's petition. In fact, the judgment of the Court was delivered by the learned Judge, Jackson, J. and the same learned Judge before whom the present Civil Revision Petition came on for hearing directed that the question should be considered by a Bench of two Judges. If the learned Judge thought that the decision in the unreported case referred to above governed the case and should be followed, it was of course open to him to follow it, (as the Lower Appellate Court has done in the present case), and dismiss the Revision Petition. Instead of that, the learned Judge directed the case to be posted before a Bench, with a view, as I understand the position, to have the question of law re-examined by the Bench. In the circumstances, I do not think that it is not open to us to examine the question in the light of the further considerations placed before us.

Our attention was drawn to the case reported in *Vaithinatha. Aiyar* v. *Vaithinatha Aiyar*,[2] where Cornish, J., took the same view of these provisions of the Insolvency Act. The learned Judge held that the provisions of S. 5 of the Limitation Act could not be applied to the case of a creditor's 'petition' under S. 9 of the Insolvency Act, because such a petition 'is not an application' within the meaning of S. 78 of the Act of 1920. I respectfully agree.

In my view, it is not necessary at present to examine the prior decisions of the several Courts in India on the question whether the time taken in getting copy of decisions passed under the Insolvency Act could be deducted in computing the period prescribed for an appeal under that Act. S. 78 has made the position clear, in cases arising under the new Act.

It could not be said that there are no 'applications' mentioned in the Provincial Insolvency Act in respect of which periods of limitation have been fixed by the Act. It is enough

2. (1931) 61 M. L. J. 544.

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to refer, for example, to S. 68 of the Act which prescribes a period of 21 days in respect of 'applications' mentioned therein.

Having regard to the various provisions of the Provincial Insolvency Act, 1920, I think that it is a legitimate inference to draw that the Legislature has, in that Act, used the expressions 'petitions' and 'applications' for different purposes and with different legal significations, and that power to excuse delay in respect of 'applications' given under S. 78 of the Act, by reference to S. 5 of the Limitation Act, is not applicable to excuse delay in filing a creditor's "petition" under S. 9 of the Insolvency Act.

The remarks of Lord Halsbury in *Commissioners for Special Purposes of Income-tax* v. *Pemsel*[5] came to my mind, where the following passages occur:

"That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of Law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences."

I find that in *Upendranath Galowa* v. *Hemchandra Koley*[6] Suhrawardy and Graham, JJ., observed at page 1390 as follows, and that in construing a fiscal enactment—

"Under Chapter XII, R. 3, Appellate Side Rules, a Court-fee of Rs. 2 is prescribed for 'swearing, affirming every affidavit,' thus indicating that there is some difference between 'swearing' and 'affirming'. It may be that solemn affirmation takes the form of an affidavit."

However much I may feel that the difference practically between a 'petition' and an 'application' is rather too fine, I feel driven to the conclusion I have arrived at, by the use of these two expressions, in various sections of the Act in question.

I may observe in passing that, so far as our attention was drawn, no such provision exists in the English Bankruptcy Act or in the Presidency Towns Insolvency Act. I may refer to Maxwell on Interpretation of Statutes, Chapter XII, S. 3, pages 516 to 522, regarding the inference to be drawn when there is a change of language in a statute.

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5. (1891) A. C. 531 at 549. 6. (1931) I. L. R. 58 C. 1389.

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In this view, it is not necessary to consider the second question raised by the learned advocate for the petitioner before us, viz., that the period of three months mentioned in S. 9 is not 'a period of limitation' at all, but is only one of the factors which along with other factors mentioned in the section created a right in the creditor which he could enforce under the Act; that while limitation bar applies only to the rights that exist, S. 9 creates no right in the creditor unless the transaction relied on as constituting an act of insolvency took place within the period mentioned in that section, and as he contends, there being no right, no question of limitation arises. I do not propose to go into this question at present. In *Aiyapparaju* v. *Venkatakrishnayya*,[3] though Spencer, J., was inclined to adopt that view, Justice Venkatasubba Rao preferred not to express any opinion on that point, as that learned Judge pointed out on the ground that "the question is a difficult one", and having regard to my opinion on the first of the two points mentioned above, it is not necessary for the disposal of the present Revision Petition to decide the second point.

For the above reasons, I agree with my learned brother that the Revision Petition should be allowed with costs in the High Court only, and the Subordinate Judge's order restored. The order as to costs passed by the Lower Courts, namely, that each party is to bear his own costs in each of those Courts, will stand.

B. V. V. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT DUNEDIN, LORD THANKERTON AND SIR DINSHAH MULLA.

U Pe .. *Appellant**

v.

U Maung Maung Kha .. *Respondent.*

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U Pe v. U Maung Maung Kha.

Burmese Buddhist Law—Property of married persons—Gift of lettetpwa *property by wife without consent of husband—Validity of.*

A gift by a Burmese Buddhist wife of the *lettetpwa* property of herself and her husband without his consent amounts to a valid transfer of her share and interest in the property gifted.

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*P. C. Appeal No. 1 of 1931. 18th March, 1932.

3. (1922) 44 M. L. J. 303.

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The Burmese Buddhist Law in regard to the three kinds of property (*lettetpwa, payin* and *hnapazon*), acquired by either or both of the spouses before or during marriage, discussed.

The husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants-in-common. Each of them has a vested interest in such joint property. Either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in such property without the consent, express or implied, of the other.

Ma Paing v. *Maung Shwe Hpaw,* (1927) I. L. R. 5 R. 296 (F. B.), dissented from

N A. V. R Chettyar Firm v. *Maung Than Daing,* (1931) I. L. R. 9 R. 524 (S. B.), approved.

Appeal No. 1 of 1931 from a judgment and decree of the High Court, Rangoon, dated the 17th March, 1930, reversing a judgment and decree of the District Judge of Henzada, dated the 12th February, 1929.

The substantial question for determination on the appeal was as to the validity of a deed of gift executed by one Ma Ma Gale in favour of the defendant-appellant. The plaintiff-respondent, who had been Ma Ma Gale's husband for over thirty years, sued to set aside this deed on two grounds: (1) that its execution was induced by the defendant by undue influence; (2) that the subjects of the deed were *lettetpwa* (joint property) of himself and Ma Ma Gale, and that the latter could not dispose of them without his consent. The defendant maintained that the plaintiff and Ma Ma Gale were divorced before the execution of the deed. The Trial Court held that there was no undue influence, and that the plaintiff and Ma Ma Gale had been "automatically divorced" in consequence of Ma Ma Gale's desertion of the plaintiff, but that the property (subject of the deed) was the *lettetpwa* of the married couple, and that the plaintiff had a one-third share therein; it decreed his suit to the extent of one-third only. The High Court, on appeal, held, after referring to the decisions in *Ma Hmon* v. *Mg. Tin Kauk,*[1] *Mg. Po Nyun* v. *Ma Saw Tin,*[2] *Ma Nyun* v. *Mg. San Thin,*[3] *Ma Kin* v. *Mg. Po Sein*[4] and *Ma Saw Kin* v. *Mg. Tun Aung Gyaw*[5] that there had been no divorce between the plaintiff and Ma Ma Gale, and that, under the circumstances, on the authority of *Ma Paing* v. *Mg. Shwe Hpaw*[6] and *U Po U* v. *Ma Tok Gyi*[7] the deed of gift was invalid and that the plaintiff was entitled to a declaration that the properties mentioned in the said deed belonged to him. They accordingly decreed the plaintiff's claim in full. The learned Judges did not go into the question of undue influence.

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1. (1923) I.L.R. 1 R. 722.
2. (1927) L.R. 54 I.A. 403: I.L.R. 5 R. 841: 53 M.L.J. 425 (P.C.).
3. (1927) I.L.R. 5 R. 537 (F.B.). 4. (1928) I. L. R. 6 R. 1.
5. (1928) L.R. 55 I.A. 38: I.L.R. 6 R. 79: 54 M.L.J. 468 (P.C.).
6. (1927) I.L.R. 5 R. 478. 7. (1929) I.L.R. 7 R. 374 (F.B.).

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Against the decree of the High Court, the defendant appealed to His Majesty in Council, and contended that, whether there had been a divorce or not, the deed of gift evidenced a valid transaction under the decision of the Special Bench in *N. A. V. R. Chettyar Firm* v. *Maung Than Daing*,[1] given after the judgment under appeal was delivered.

Geoffrey Lawrence, K. C. and *Leach* for appellant.

A. Pennell for respondent.

18th March, 1932. Their Lordships' judgment was delivered by

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VISCOUNT DUNEDIN.—This is a suit in which U Maung Maung Kha, the plaintiff, seeks to set aside a conveyance of certain property gifted to U Pe, the defendant, by Ma Ma Gale, wife of the plaintiff but now deceased. The plaintiff and his wife were Buddhists and their mutual rights depended on Burmese Buddhist law. They were married in 1892 having both been previously married and they had no children but adopted two girls Ma Khin May and Ma E Kyi. The father of Ma Ma Gale was U Pan; he lived in Henzada. The plaintiff lived at Rangoon and his wife lived sometimes with her husband at Rangoon and sometimes at Henzada. She traded on her own account at Henzada.

In 1910 U Pan died leaving two daughters, the said Ma Ma Gale and one Ma Ma Gyi a spinster, and some grandchildren the offspring of a deceased child. In 1912 U Pan's estate was divided between his two daughters. It consisted of two houses, one the pucca house and the other the little house and some paddy fields. The plaintiff then came to Henzada permanently and lived with his wife in U Pan's little house. In 1916 the plaintiff built another house, and when it was finished his wife and he lived in it. The adopted children lived with Ma Ma Gyi in the little house. Ma Ma Gyi began to rebuild the pucca house but died in 1923; the rebuilding was finished by the plaintiff and his wife. On Ma Ma Gyi's death her share of U Pan's property passed to Ma Ma Gale. Ma Ma Gale looked after the two houses and received all rents from them so far as let and also the rents from the paddy lands. A conveyance was then executed by the plaintiff and Ma Ma Gale of the houses and lands in favour of the adopted children, but as it is admitted on both sides that this was benami and did not represent any real

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transaction it may be ignored. After Ma Ma Gyi's death the little house was sold by the plaintiff and Ma Ma Gale to one Olivari. The adopted children then moved to the pucca house which was nearly finished. In 1924 the spouses quarrelled and after that did not live together, the plaintiff living in his own house and Ma Ma Gale in the pucca house. They never lived together again. In 1927 Ma Ma Gale fell ill. The plaintiff attempted to enter the house where his wife was but the door was shut against him. Following on this, on the 2nd March, 1927, Ma Ma Gale removed to the house of the defendant and appellant, and on the next day she executed a deed of gift of all her properties inherited from her father U Pan in favour of the defendant. The plaintiff thereupon instituted a suit for restitution of conjugal rights against her, but before any progress had been made Ma Ma Gale died on the 28th June, 1927. Thereupon the plaintiff raised the present suit to have the conveyance in favour of the defendant declared void.

Before stating the grounds of action it will be well to state the Burmese Buddhist law in regard to the property of married persons so far as it is not a matter of controversy between the two parties. Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both. What that exactly means will be discussed afterwards. Partition takes place either on death or on divorce. Property consists of three kinds: "*payin*," which is the property which had belonged to the spouses individually before marriage; "*lettetpwa*," which is the property accruing to either spouse individually either by particular exertion or by succession after the marriage; sometimes, therefore, described as of two kinds, viz., ordinary *lettetpwa* and *lettetpwa* by succession; and *hnapason*, which is the property acquired by the spouses during the marriage by their exertions or from the produce of the property they already have. On partition *lettetpwa* goes two-thirds to the spouse who actually made it or succeeded to it and one-third to the other. *Hnapason* and *payin* are equally divided.

In the present case the subject of the gift was admittedly *lettetpwa* of the wife acquired by succession on her part, as it was the property which either directly or through her sister she had inherited from her father, U Pan.

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The plaintiff attacked the conveyance on three grounds: (1) he said the deed was secured by undue influence on the part of the defendant; (2) he said that there having been no divorce the wife could not alienate *lettetpwa*; (3) that the only ground on which divorce could have been alleged being desertion, and that being desertion by the wife, she had forfeited her property for her fault. To these assertions the defendant replied (1) that there was no undue influence; (2) and (3) that there was divorce and not for fault; and (4) that in any view she was entitled to deal during the marriage with her *lettetpwa* to the extent of two-thirds. The Trial Judge held that there was no undue influence and that there was divorce. He, therefore, held that she was entitled to dispose of her *lettetpwa* to the extent of two-thirds, to which extent he confirmed the conveyance. The Court of Appeal held that there was no divorce and that being so that the wife had no power to dispose of any *lettetpwa*. This made it unnecessary for them to consider the question of undue influence but enabled them to recall the judgment and to give decree in favour of the plaintiff. Against this judgment the present appeal has been taken.

The question of undue influence may be at once disposed of. On such a question their Lordships would not willingly reverse the judgment of the Trial Judge, untouched by the Court of Appeal, he having individually seen the majority of the witnesses—some of them were examined by others than himself. But on the evidence as it stands their Lordships are of opinion that the case utterly fails. There is not the slightest trace of evidence of weakness of character or want of intelligence on the part of the wife up to the day of her death. On the contrary she was an able, managing woman, who, according to the testimony of the plaintiff himself, had successfully made much money, had been left by him in entire charge of the properties which came from her father, and had never needed assistance in business matters in any way. It is true that by the conveyance she entirely divested herself in favour of the defendant but he was her friend whom she trusted. She was utterly estranged from her husband; for three years they had no dealings together and all her relations were gone, the adopted children being dead and the grandchild who was still with her having forfeited all claim by elopement. Their Lordships,

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therefore, have not the slightest hesitation in affirming the decision of the Trial Judge in this matter.

Next, as to divorce. The divorce that has here to be dealt with is of a kind quite foreign to western ideas. It is known as "automatic." The passage of the Laws of Menoo, Bk. 5, S. 17, which is admitted to rule the matter is, as translated by Richardson, as follows:—

"If the wife, not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again."

The difference of view that developed between the Trial Judge and the Court of Appeal was partly based on a survey of the evidence as to what communication there had been between the spouses after the wife definitely left her husband, and partly on a difference of opinion as to whether the wife, being admittedly in possession of the total amount of the *lettetpwa* property, one-third of which on partition would belong to the husband, could be held to have been supported by him in a way to meet the text cited above. As to forfeiture on account of fault that matter, which does not seem to have been even stated below but was urged before their Lordships, may at once be dismissed, for the text and decisions which deal with fault show that fault is a fault of another kind, the mere going away, or as in western phraseology it would be termed desertion, not being a fault. Their Lordships, however, do not think it necessary that they should decide as between the Trial Judge and the Court of Appeal on the question of divorce because they are prepared to decide the case on another ground, a ground which though pleaded was not open to the Court below as they were bound by a former decision of a Full Bench. The case which bound them was *Ma Paing* v. *Maung Shwe Hpaw*[2]. The headnote of that is as follows:—

"*Held*, that at Burmese Buddhist law, in respect of the property of the marriage, whether that property be the *payin* property of either party or *lettetpwa* property of the marriage, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether *payin* or *lettetpwa*, is partnership property.

Held, further, that at Burmese Buddhist law, the partnership between husband and wife is dissolved only by death or divorce and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce."

2. (1927) I.L.R. 5 Rang. 296 (F.B.).

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This case was decided by five Judges in 1927, but since that case was decided there has been decided the case of *N. A. V. R. Chettyar Firm* v. *Maung Than Daing*[1] by a Special Bench of seven Judges, one Judge dissenting, and that case overruled the case of *Ma Paing*[2] and the headnote of that case held that

"the husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants in common. Each of them has a vested interest in such joint property, and such an interest is liable to attachment and sale in execution of a decree against the party entitled to it."

Held further:

"Either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in the joint property, but neither of them is entitled to alienate the interest of the other without the consent, express or implied, of that party"

It is, therefore, clear that the judgment of the Board in this case must depend on whether they agree with the law as laid down in the earlier or the later of these two cases. To appreciate the question it is necessary to go back to the case-law as it stood when the earlier case of *Ma Paing* came up for decision. In the case of *Ma Shwe U* v. *Ma Kyu*[3] a Full Bench had held that a sale by the Burmese Buddhist husband of the *hnapason* property of himself and his wife without her consent amounted to a valid transfer of his share in the property sold. It is obvious that the case of *lettetpwa* property is *a fortiori* of this as to the interest of one spouse therein. This was clear law and stood undisturbed till 1927 when *Ma Paing's* case was decided. There were other decisions to the same effect and it was candidly admitted by the Judges in *Ma Paing's* case that they were overruling the existing law.

Ma Paing's case was this. A Burmese trader had had five wives. He got into difficulties through speculation and his creditors attached his various properties. These properties were the whole properties enjoyed during the marriage. The last of the five wives applied at the time of the attachment for the release of her interest, which was granted. The properties were sold. The wife then brought the action against the purchaser seeking a declaration that her interest in the properties amounted to half. The Trial Judge dismissed the suit. The wife appealed and the case came before a Divisional Court of two Judges, Heald and Chari, JJ. They did not, however, decide it at once but made a reference to the Full Bench in the

1. (1931) I. L. R. 9 Rang. 524 (S. B.).
2. (1927) I.L.R. 5 Rang. 296 (F.B.). 3. (1905) 3 L.B.R. 66 (F.B.).

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following terms:—

"(1) Where the interest of a Burmese Buddhist husband in property which was *payin* property brought by him to the marriage, is during the subsistence of the marriage sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, does the buyer acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it ?

(2) In a similar case, where the property is jointly acquired *lettetpwa* and not *payin*, does the buyer acquire a right to partition and possession of a share?

(3) Can a decree against a Burmese Buddhist husband be executed against (*a*) *payin* property brought by him to the marriage, and (*b*) jointly acquired *lettetpwa* property of the marriage, to the extent of the whole of such property or if not to the extent of the whole to the extent of any part of such property, and if to the extent of part only to the extent of what part?"

The reference was accompanied by a disquisition on reported cases by Heald, J., which is far too long to quote. It must be incidentally stated that in this disquisition and in the phraseology of the questions referred the term *lettetpwa* is used as including what is more accurately called *hnapazon*. The accurate nomenclature is used by the Full Bench to which the case was referred and is in accordance with what has already been said above. He ends the disquisition by these words "on the authorities I am unable to decide what answer ought to be given in the present case. It seems clear that the case-law is conflicting and unsatisfactory and there are practically no rules in the Dhammathats." But he had previously given no uncertain sign as to what his own opinion was. Two citations will be sufficient:—

"Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu*[3] where it was held that a Burmese Buddhist husband cannot sell or alienate the *hnapazon* (*lettetpwa*) property of himself and his wife without the consent of the wife express or implied or against her will but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent, and with all respect I venture to suggest that the latter part of this decision was mistaken."

(Inconsistent they certainly are not, though the latter part may be mistaken.) And again :

" It would seem to follow that if the interest of one of a married couple is attached all that can be attached is the expectancy of receiving a share of the family property on divorce or death and since neither of the parties can claim partition or separate possession of any part of the property or can alienate any part of it without the consent of the other it is difficult to see how a creditor attaching the interest of one of the couple can enforce parti-

3. (1905) 3 L.B.R. 66 (F. B.)..

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tion or alienation of any particular item of the property, or can attach or bring to sale more than the expectancy, which his debtor has, of receiving something on divorce or at the death of one of the parties."

The Full Bench consisted of the two Judges who had made the reference, with the addition of Maung Ba and Doyle, JJ. and Rutledge, C. J. Now though all the learned Judges agreed in answering questions 1 and 2 in the negative and question 3 in the affirmative "so long as the debt was incurred in the usual course of business by or on behalf of the firm consisting of husband and wife" they did not quite agree in their views. One view ran through all their opinions and that was that the right in common which indubitably a Burmese husband and wife had as to all property to which either or both could lay a claim was a right of partnership and that being settled they had recourse for the consequences which flowed from that to the law of partnership as is understood and incorporated in the Indian Contract Act. Now one consequence of partnership is that partnership property is joint property; the partners are joint tenants. This necessarily overrules the proposition which had been laid down in *Maung Shwe U's* cases but when it came to the discussion as to what was to be done about attachment and realisation their views did not agree. The one set thought that as regards a partnership debt attachment and realisation was simple, and in the case of debts singly contracted by husband or wife alone they laid down the proposition that there was a presumption that such debts were incurred by the husband or wife as the case may be as agent for the partnership. Obviously this could not apply to an ante-nuptial debt and in that case the creditor would either have to wait until the partnership was dissolved by death or divorce or could proceed under O. 21, R. 49 of the Code of Civil Procedure. The others went further and thought that so far as an individual debt was concerned there was no fund to be looked to other than a sort of *spes successionis* when death dissolved the partnership and partition took place, and that no proceedings could be taken under O. 21, R. 49. A very few quotations will illustrate this. Both sets of Judges are obviously struggling with the idea that the law they are laying down would be subversive of business with any married Buddhist. Thus Maung Ba, J., said in *Ma Paing* v. *Maung Shwe Hpaw*[3] at page 329,

2. (1927) I.L.R. 5 Rang. 296 (F.B.). 3. (1905) 3 L.B.R. 66 (F.B.).

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" a person dealing with a Buddhist has the ordinary law of contract to fall back upon." This at first sight looks like a confusion of thought. The law of contract in the abstract has nothing to do with the question of what property can be attached in respect of an obligation admitted or decreed, but in the next sentence he gives his real reasons and shows that he means the law of contract as embodied in the law of partnership: "It has been rightly held from time to time that to all intents and purposes Burmese husbands and wives may be regarded as partners. A partner can bind his partner and every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership." Assuming that the law of partnership applies he holds that any debt as say the debt in the case before him contracted by the husband in the course of business binds the wife as incurred by her partner agent. Obviously the reasoning did not deal with an ante-nuptial debt by either but that case was dealt with by Chari, J., who followed him. He held that the partnership created by marriage could only be dissolved by divorce or death and that if one of the couple alienated his or her interest in the partnership it was possible for the alienee to make good his right by putting in force O. 21, R. 49 of the Code of Civil Procedure. This rule provides for the charging of a partnersnip share at the instance of the creditor of an individual partner so that the profits of a share of the partnership become payable to the charger but does not allow of the sale of partnership property. This view, however, did not commend itself to either Heald or Doyle, JJ. They went the full length and said that there was no partnership property out of which a debt due by the husband or wife could be satisfied during the subsistence of the marriage, and when the case after the reference came to be finally determined by Heald and Chari, JJ., they laid it down as settled by the judgment in the reference (though their Lordships doubt whether they were quite fair to all their brethren in saying so) that during the subsistence of the marriage the separate interest of the partners to the marriage in the property of the marriage was not only impartible but also indeterminate and indeterminable since it can only be determined on the death or divorce of the parties and further they held that such an interest is not saleable property within the meaning of S. 60 of the Code of Civil

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Procedure and as such liable to attachment and sale in execution of a decree. That is equivalent to saying that it does not come within the words "all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit."*

Then came the case of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*[1]. The facts are simple. There was an ante-nuptial debt of the wife for which debt the husband was not liable. The property sought to be taken in execution was proper *lettet-pwa* of the marriage. Now, this case was not ruled by the actual decision in *Ma Paing's* case, but it was obviously affected by what had been said in the general review of the law given in the reference in that case. The Trial Judge accordingly referred to a Full Bench the following question[4]:—

"Whether the joint property acquired by the husband and wife possibly out of the property brought to the marriage by the couple is liable to pay the debt contracted by either of the couple before the marriage?"

The three Judges who constituted the Full Bench had such doubts as to the soundness of what had been laid down in *Ma Paing's* case that they in their turn referred to a Special Bench of seven Judges the following questions:—

"(1) Whether the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone?

(2) Whether in such circumstances the interest therein of the judgment-debtor can be attached?

(3) Whether in such circumstances the separate property (if any) of the judgment-debtor can be attached?

(4) Whether the principles of law enunciated in *Ma Paing's* case are correct?"

The leading judgment was a very exhaustive and able judgment by Page, C. J. It begins by pointing out the serious results of upholding *Ma Paing's* case which had upset the standing judgments of about 20 years. It comes to this, that no one would be in safety to deal commercially with a married Burmese Buddhist unless he was sure that the wife could be held party to the transaction, and further, that as far as ante-nuptial liability was concerned that would be for practical

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* See *Ma Paing* v. *Mg. Shwe Hpan*, (1927) I. L. R. 5 Rang. 478.—K. J. R.

1. (1931) I. L. R. 9 Rang. 524 (S. B.).

4. The reference to the Full Bench was made by Das, J., sitting in second appeal. *See* I. L. R. 9 Rang. at p. 530.—K. J. R.

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purposes escaped by marriage. And now it may be as well to say something as to the law by which Burmese Buddhists' relations fall to be determined. The *Dhammathats* are a body of authority, consisting of many texts, sometimes contradictory, but yet in their entirety forming what may be called the Institutional Buddhist Law. There is no difficulty in holding this as the supreme authority where such questions as succession are concerned, and an instance may be given in the judgment of this Board in the case of *Mah Nhin Bwin* v. *U Schwe Gone*[5]. But when commercial relations or execution for debt come into question, then they are not necessarily in accordance with modern conditions. The ancient idea of making good a debt by selling the debtor into slavery is, for instance, quite obsolete. Indeed, the Court in *Ma Paing's* case felt this; recognising that the *Dhammathats* provided for a right to both husband and wife in all property during the marriage, they assumed that that right was a right of partnership, with the consequences set forth above. The key to the judgment in *Chettyar Firm's* case[1] is to show that the position is best established by holding that the spouses are in western nomenclature not joint tenants but tenants in common. Thus the idea of an interest in common asserted by the *Dhammathats* is preserved without the evil consequences following from holding that that is the joint interest of partnership. It is admitted by all the Judges in *Ma Paing's* case that the *Dhammathats* do not deal exactly with the situation. They could not well do so. Their Lordships do not think it is necessary to examine the texts quoted, because that has been done with great thoroughness by Page, C. J. in his judgment. The outcome of it is that there is nothing in them which would point more to joint ownership than to tenancy in common, and therefore it is quite right to prefer the one which leads to the least evil consequences. After all, the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein.

One word more remains to be said. Maung Ba, J., was one of the Court that decided *Ma Paing's* case. He was also one of the Court that sat on *Chettyar Firm's* case. It would have been quite

1. (1931) I. L. R. 9 Rang. 524 (S. B.).
5. (1913) L. R. 41 I. A. 121: I. L. R. 41 C. 887: 27 M. L. J. 41 (P.C.).

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understandable if he had chosen to remain of his original opinion and dissented, but he did not do that. He was content to abandon nearly all the points that had been laid down in *Ma Paing's* case but thought he might save something out of the wreck. So he said that, subject to the right of creditors, neither the husband nor the wife as between themselves had the right to alienate his her interest, in the joint property without the consent, express or implied, of the other. This was dead in the teeth of what the others had laid down. They had said that either party to the marriage is competent to alienate or otherwise dispose of his or her interest in the joint property. The others were bound to lay this down, not because the facts of the case needed it but because the reference had referred the whole law as laid down in *Ma Paing's* case, and that case had laid down exactly the opposite. But, in truth, Maung Ba, J.'s position is an impossible one. Once he had given up, as he had given up, the theory of joint property and of the interest of the spouses being indeterminate and indeterminable, there was no possibility of excluding creditors, and creditors not being excluded it followed that there was a power of disposition. Of course there are situations in which property may be beyond the disposing power of the owner and yet be liable to be taken by creditors, but that is only when there is something which affects the property itself. The simplest illustration is that of property held under strict settlement, but on which there is a mortgage which was put on the property before it was put in settlement. But when there is nothing which affects the property as such, then if the owner's personal creditors can attach, the owner can dispose. The position of unburdened property which can be attached but cannot be disposed of is a juridical contradiction in terms.

The result is that the conveyance was good to the extent of Ma Ma Gale's interest therein, viz., two-thirds. That is the same result as arrived at by the Trial Judge though on different grounds.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the decree of the Trial Judge restored, the respondent paying to the appellant the costs in the Court of Appeal and before this Board.

Solicitors for appellant: *Cutler, Allingham and Ford.*

Solicitor for respondent: *J. E. Lambert.*

K. J. R. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Syed Mohammad Raza, since deceased (now represented by Syed Mohammad Abbas and others), and others .. *Appellants**

v.

Musammat Abbas Bandi Bibi .. *Respondent.*

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Syed Mohammad Raza *v.* Musammat Abbas Bandi Bibi.

Muhammadan Law (Shiah School)—Compromise deed—Construction—Gift—Transfer of Property Act, 1882, *S.* 10—*Oudh Laws Act,* 1876, *S.* 3—*Words* "malik mustaqil" (*permanent owners*) *in compromise deed, when construed as conferring merely a life-estate and not full ownership—Partial restriction against alienations outside the family, not void for repugnancy.*

By a deed of compromise made between an intending husband and wife (Shiah Muhammadans), certain immovable property was given to the woman, Sughra Bibi, as *malik mustaqil* (*i.e.*, as permanent proprietor), and it was provided (*inter alia*) that she "shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on her legal heirs, from generation to generation".

The wife (Sughra Bibi) sold and mortgaged all the property to the defendants (strangers to the family), and on her death the plaintiff, claiming as her heir, sued to recover the property from the hands of the defendants to whom it had been so transferred by the deceased in direct breach of the agreement.

Held, (decreeing the plaintiff's suit)—

1. That the compromise was not a deed of gift or a conveyance, but was in the nature of a contract and a family arrangement, and that family arrangements are specially favoured in Courts of Equity.

2. That on the construction of the particular document as a whole, Sughra Bibi took only a life-estate in the property and had no power to transfer any part of it to the defendants.

3. That a partial restriction imposed by the document, against alienations outside the family, was not void for repugnancy. (S. 10, Transfer of Property Act, 1882, and S. 3, Oudh Laws Act, 1876, referred to.)

The question whether under the Shiah Law a life-estate with a vested remainder in the heirs is permissible, left open.

Raghunath Prasad Singh v. *Deputy Commissioner, Partabgarh,* (1929) L. R. 56 I. A. 372: I. L. R. 4 Luck. 483: 58 M. L. J. 1 (P.C.), distinguished.

Waghela Rajsanji v. *Shekh Masludin,* (1887) L. R. 14 I. A. 89: I. L. R. 11 Bom. 551 at 561, In re *Macleay,* (1875) L. R. 20 Equity 186, and *Gill* v. *Pearson,* (1805) 6 East 173: 102 E R. 1253, followed.

Judgment of the Chief Court of Oudh, reported in *Mt. Abbas Bandi Bibi* v. *Saiyid Md. Rasa,* (1929) I. L. R. 4 Luck. 452, affirmed.

Appeal No. 97 of 1930 from two decrees of the Chief Court of Oudh, dated the 4th January, 1929, which reversed a

* P. C. Appeal No. 97 of 1930. 12th April, 1932.
Oudh Appeal No. 3 of 1929.

decree of the Subordinate Judge of Fyzabad, dated the 30th September, 1927, and decreed the plaintiff's suit in full.

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The questions for determination on the appeal were: (1) Whether upon the true construction of a deed of compromise, dated the 19th September, 1870 (the relevant terms of which are set out in their Lordships' judgment), one Sughra Bibi had obtained an absolute estate in the property in suit; and (2) whether under the Shiah Law conditional gifts are valid. The Chief Court of Oudh answered the first question in the negative, and the second in the affirmative.

Against the judgment and decrees of the Chief Court, the defendants preferred the present appeal to His Majesty in Council.

Dunne, K. C. and *Wallach* for appellants.

De Gruyther, K. C. and *L. M. Jopling* for respondent.

12th April, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The facts necessary for the decision of this appeal are within a small compass.

In 1868 one Sughra Bibi brought a suit against her cousin, Afzal Husain, claiming a half-share in certain immovable properties in Oudh which had been entered in his name at the post-mutiny settlement. The litigation ended in a compromise upon which a decree was passed in the suit on the 19th September, 1870. The compromise was in the following terms:—

"We are Musammat Sughra Bibi, plaintiff, claimant of a share in Mahal Shadipur, Nusha, etc., pargana Tanda, and Surhurpur, and Syed Afzal Hasan, son of Syed Tegh Ali Qanungo, Lambardar of the aforesaid Mahal, defendant.

Whereas between the parties to the above-mentioned case in which a share is claimed an amicable settlement has been arrived at to the effect that the plaintiff's marriage by way of *nikah* with the defendant may be performed in the next month, accordingly in view of a marriage settlement, there no longer exists any dispute regarding a share, and insomuch as the defendant's first wife, the daughter of Raja Syed Abbas Ali, deceased, is alive, it has been settled that both wives should, in accordance with this agreement, in their capacity as wives, from this very time be declared permanent owners [*malik mustaqil*] of a moiety each of the entire Mahal Shadipur, and that the names of Musammat Fatima Begam, the first wife, and Musammat Sughra Bibi, plaintiff, be entered in the public records as owners of half and half [*bil munasfa milkiatan*]. The said females shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on the legal heirs of both the abovenamed wives, from generation to generation[1]; and the management and collections of the entire estate of Shadipur shall be in the hands of their husband, Syed Afzal Hasan,

1. In the original compromise, in the vernacular, these words "generation to generation", are *naslan bad naslan*.—K. J. R.

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in his capacity of a husband; if on the part of the husband there is any act of neglect or estrangement towards either of the wives, then, in that case, the wife's only remedy will be to have the management of her share performed by the Government through the Court of Wards; but during the lifetime of Afzal Hasan neither of the wives shall have the power on her own authority to have the management of the share which is owned by her performed by any member of her father's family, and if in contravention of this agreement the defendant refuses to marry the plaintiff by way of *nikah*, then the plaintiff shall in accordance with this document remain owner of a moiety, and if the plaintiff acts contrary to the stipulation of *nikah*, she shall cease to have any rights whatever. If, God forbid, contrary to custom the divorce of either of the wives takes place, then, even in that case, ownership shall remain vested in the wives, as before, subject to the conditions mentioned above; provided that the divorced wife should regard herself as an undivorced wife, and like a woman without a husband continue to live in the house, and be it understood that the aforesaid conditions shall apply to whatever share exists in the villages comprised in Mahal Shadipur, as detailed below:—(1) Shadipur, (2) Ninawan, Behrai, Daudpur, Nandapur, Qutubpur, Belahri,Daryapur; moreover, whatever property,such as Chitoi and Nausanda and Musha, etc., pargana Tanda and Halimpur and Lodhna and Nathupur, pargana Surhurpur, etc., exists at present, or may be acquired in future, shall, during the lifetime of Mir Teg Ali and myself (the defendant), continue to remain in possession of the defendant, and after me (the defendant) this property also shall devolve on the two wives or their descendants (*aulad*) in equal shares.

Hence this agreement is made in writing in order that it may serve as evidence thereof and the pending case may be decided in accordance with its terms."

Afzal Husain thereafter duly married Sughra Bibi and died in 1872 childless, his first wife Fatima Begum having predeceased him in 1871. Sughra Bibi took possession of her share in the properties, but had sold or mortgaged it all before her death, which occurred on the 26th July, 1914. Her transferees remained in undisturbed possession for nearly 12 years after her death.

On the 26th March, 1926, the suit out of which this appeal has arisen was instituted by the respondent in the Court of the Subordinate Judge of Fyzabad for the recovery of two-thirds of Sughra Bibi's share from the appellants, in whose possession the properties had come under the alienations above referred to.

The respondent's case was that under the compromise Sughra Bibi took only a life-estate without power of alienation, and that on her death the half share passed to her heirs of whom the respondent, in right of her mother Zainab Bibi, the sister of Afzal Husain, was one, her share being two-thirds. The other heirs, taking the remaining third, were said to be certain maternal relatives of Sughra Bibi, who apparently made no claim, and were not joined as parties to the suit, but it is not suggested that it is defective on this account. The present

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appeal therefore is concerned only with two-thirds of the property, and the rights of the parties depend in the first instance on the validity of the alienations by Sughra Bibi, the title of the respondent, if these alienations were invalid, not being disputed.

A preliminary issue which covered this question was raised and tried by the Subordinate Judge. It was in the following terms:—

"Was the restriction placed by the compromise deed, dated 19th September, 1870, upon Sughra Bibi's power of alienation valid and legally enforceable?"

The learned Judge after a detailed but not very informing examination of the case-law on the subject, held that the restriction imposed by the deed on the lady's power of alienation was invalid and inoperative, and he accordingly answered the issue in the negative.

The hearing of some 28 other issues in the case came subsequently before another Subordinate Judge, with the result that the suit was dismissed with regard to certain of the properties claimed, but decreed with regard to others.

Both sides appealed to the Chief Court. The case was heard by Raza and Pullan, JJ., who delivered their judgment on the 4th January, 1929, allowing the appeal of the present respondent, and dismissing that of the appellants, with the result that the suit was decreed in full. The questions other than that as to Sughra Bibi's power of alienation are not now material. They were in part disposed of by concurrent findings of fact of the two courts, and for the rest involve matters subsidiary to the main issue as to the validity of the alienations.

The learned Judges of the Chief Court discussed the meaning of the word *malik* which has been used throughout the compromise agreement, but came to the conclusion that having regard to the express provision that the ladies were not to have power to transfer the property to a stranger, they had only a "limited ownership," with a gift over to their heirs. They then considered whether under the Shiah law, by which the parties were governed, such an arrangement would be valid, and came to the conclusion that it would.

Before the Board the case-law has been discussed at great length, but without throwing much light upon the construction of the particular document with which this appeal is concerned.

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It was urged for the appellants that the true effect of the document was to constitute the ladies full owners of the two moieties of the property, and that the attempt to restrict their power of alienation should be regarded as repugnant, special reliance being placed upon the judgment of the Board delivered by the late Sir Binod Mitter in *Raghunath Prasad Singh* v. *Deputy Commissioner, Partabgarh*[1]. For the respondent it was contended that, having regard to the decisions of this Board, the use of the word "malik" did not necessarily imply full ownership, and that reading the document as a whole the ladies took only life-estates with vested remainders in their heirs.

In support of the appellants' contention it was pointed out that the ladies were to be "malik mustaqil," *i. e., permanent proprietors,* and were to be entered as such in the public records; that their proprietorship was to take effect from the execution of the document, and that if Afzal Husain refused to marry Sughra Bibi, she was to "remain owner of a moiety" free from restriction of any kind; that other property, to which Sughra Bibi had made no claim, was also dealt with; that it was to remain in the possession of Afzal Husain during his life and the lifetime of his father Tegh Ali, and then was to "devolve on the two wives or their descendants in equal shares" —again, as the respondent's counsel concedes, without restriction. From this it is said to be clear that the draftsman of the document was quite competent to put a life-estate into direct words if that had been the intention of the parties under the first part of the agreement. It is also suggested that the words upon which the respondent relies as constituting a gift over to the ladies' heirs are only explanatory of the restriction against transfer to a stranger, which immediately precedes them, and it is pointed out with some force that if only life-estates were intended the restriction would not have been confined to the case of strangers.

Their Lordships feel the weight of these contentions, and they might have some difficulty in holding that Sughra Bibi took nothing more than a life-estate. But assuming in the appellants' favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to "a stranger".

1. (1929) L.R. 56 I.A. 372: I.L.R. 4 Luck. 483: 58 M.L.J. 1 (P.C.).

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Their Lordships have no doubt that "stranger" means any one who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless, therefore, this restriction can for some reason be disregarded, they have no title to the properties which can prevail against the respondent.

On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that *Raghunath Prasad Singh's* case[1] is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is, in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them.

The law by which this question must be judged is, their Lordships think, prescribed by S. 3 of the Oudh Laws Act, 1876, and failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India.

Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging

1. (1929) L. R. 56 I. A. 372: I. L. R. 4 Luck. 483: 58 M. L. J. 1 (P. C.).

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the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement, could hardly support their claim by an appeal to these high sounding principles, and it must be remembered in this connection that family arrangements are specially favoured in courts of equity.

But, apart from this, it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos*, be regarded as repugnant: see S. 10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience.

It was said by Lord Hobhouse in *Waghela Rajsanji* v. *Shekh Masludin*,[2] that the expression "equity and good conscience" was generally interpreted as meaning English law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would not be regarded as repugnant even in the case of a testamentary gift. So in In re *Macleay*[3] Sir George Jessel, M.R., upheld a condition attached to a devise in fee that the devisee should "never sell out of the family," pointing out that this had been the law from the time of Coke; and in *Gill* v. *Pearson*[4], Lord Ellenborough in the King's Bench affirmed the validity of a similar restriction.

Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her.

Their Lordships have heard much discussion of the question whether the Shiah law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person, but, in the view they take of the appellants' case, it is

2. (1887) L. R 14 I. A. 89 at 96.; I. L. R. 11 B. 551 (P. C.).
3. (1875) L. R. 20 Eq. 186. 4. (1805) 6 East 173: 102 E. R. 1253.

unnecessary for them to come to any conclusion upon this somewhat abstruse problem, or to consider the authorities that have been cited.

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In their Lordships' opinion Sughra Bibi had no power to transfer any part of the properties to the appellants, and upon her death the respondent became entitled to the two-thirds share in the properties which she claims. They think that this appeal fails, and that the decree of the Chief Court, dated the 4th January, 1929, should be affirmed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondent : *Watkins and Hunter.*

K.J.R. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, SIR JOHN WALLIS AND SIR GEORGE LOWNDES

Lasa Din .. *Appellant**

v.

Musammat Gulab Kunwar and others .. *Respondents.*

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Lasa Din v. Mt. Gulab Kunwar.

Indian Limitation Act (IX of 1908), Art 132—Mortgage for fixed term, with option to mortgagee to realise entire sum on default by mortgagor in payment of interest annually—Terminus a quo—*"When the money sued for becomes due".*

A mortgage bond, under which the principal amount was to be repaid in six years, provided for payment of interest annually and that, in case of default, the mortgagee would be entitled "within and after the expiry of the stipulated period of six years" to realize the entire mortgage money in a lump sum.

No interest was ever paid under the mortgage, and the mortgagee brought a suit to enforce his security within 12 years from the expiry of the stipulated period (six years), but more than 12 years from the first default in the payment of interest.

Held, that the proviso in question was inserted in the mortgage deed exclusively for the benefit of the mortgagee and gave him an option either to enforce his security at once on default by the mortgagor in the payment of the interest or to wait for the full term of the mortgage, and it was not competent to the mortgagor to take advantage of his own default and claim a right to redeem before the expiry of the stipulated term.

Held, accordingly, that the principal money did not become "due" (within the meaning of Art. 132 of the Indian Limitation Act) immediately upon default, but when *both* the mortgagor's right to redeem and the mortgagee's right to enforce his security accrued, and that therefore the suit was well in time under Art. 132.

Gaya Din v. *Jhumman Lal*, (1915) I.L.R. 37 All. 400 (F. B.) and *Shib Dayal* v. *Meharban*, (1922) I. L. R. 45 All. 27 (F. B.), overruled.

Pancham v. *Ansar Husain*, (1926) L. R 53 I. A. 187 : I. L R. 48 A. 457 (P. C.), relied on.

*P.C. Appeal No. 63 of 1931. 21st June, 1932.
Oudh Appeal No. 18 of 1929.

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Reeves v. *Butcher*, (1891) 2 Q. B. 509, distinguished.

Judgment of the Chief Court of Oudh (reported in A. I. R. 1929 Oudh 536 : 6 O. W. N. 925) reversed.

Appeal No. 63 of 1931, by special leave, from a decree of the Chief Court of Oudh, dated the 23rd September, 1929, affirming the decrees of the District Judge and the Subordinate Judge of Lucknow.

The suit giving rise to the appeal was brought by the plaintiff-appellant to enforce payment of a mortgage, and the sole question for issue before the Board was, whether or not the plaintiff's claim was barred under the Indian Limitation Act, Art. 132.

The terms of the mortgage deed were as follows:—

"I am Bikram Singh, son of——. Having borrowed the sum of Rs. 900, bearing interest at 12 annas per cent. per month, from Lasa Din, I have appropriated the same to my use, and having mortgaged and hypothecated, for the satisfaction of the said creditor, one anna out of 8 annas zemindari share in Mauza——, owned and possessed by me and my ancestors, I do hereby covenant and reduce to writing that I shall continue to pay interest on the aforesaid sum every year regularly; that if interest for any year be not paid by me, the same unpaid amount of interest shall be deemed as tantamount to principal and interest at the above rate, shall continue to run thereon as well, and I shall have no objection whatever against the payment thereof; that having paid the entire principal in a lump sum in six years, I shall get the mortgaged share redeemed."

Then followed the proviso beginning "in case of default", which is set out in full in the Board's judgment.

The material dates are given in their Lordships' judgment and in that of the Chief Court reported in A.I.R. 1929 Oudh 536. The Chief Court held, following *Gaya Din* v. *Jhumman Lal*[1] and *Shib Dayal* v. *Meharban*[2] and distinguishing *Pancham* v. *Ansar Husain*[3] that limitation ran forthwith from the first default in the payment of interest, and that the suit having been brought more than 12 years from such default, was time-barred under Art. 132 of the Limitation Act.

Against the decree of the Chief Court, the plaintiff appealed, by special leave, to His Majesty in Council.

J. M. Parikh for appellant.—The money sued for did not become "due", within the meaning of Art. 132 of the Limitation Act, on the occurrence of the first default. The plaintiff had an option of not calling in the entire principal money until the

1. (1915) I.L.R. 37 A. 400 (F.B.).
2. (1922) I.L.R. 45 A. 27 (F.B.).
3. (1926) L.R. 53 I.A. 187: I.L.R. 48 A 457 (P.C.).

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expiry of the stipulated term of six years: *Narna* v. *Anmani Amma*[4] and *Muthiah Chettiar* v. *Venkatasubbarayulu*[5] and the dissenting judgment of Banerji, J., in *Gaya Din* v. *Jhumman Lal.*[1] Decisions under Art. 75, which is differently worded, are inapplicable. *Hemp* v. *Garland*[6] and *Reeves* v. *Butcher*[7] were decided under the English statute of James and may well be sustained under Art. 75 of the Indian Act, but they are misleading when applied to a case arising under Art. 132.

[LORD THANKERTON.—The question is this: When the mortgagee has the option, does the money become due before he exercises his option?]

[SIR JOHN WALLIS.—If the mortgagee had made a demand on the first default, he would have exercised his option, and the money would have become due.]

It is submitted that in view of the Board's decisions in *Juneswar Dass* v. *Mahabeer Singh*[8] and *Pancham* v. *Ansar Husain*[3] the Full Bench decisions of the Allahabad Court in *Gaya Din* v. *Jhumman Lal*[1] and *Shib Dayal* v. *Meherban*[2] should no longer be adhered to. "Due" in the third column of Art. 132 cannot be interpreted as "payable": *Shunmuga* v. *Ramalingam.*[9]

Reference was made also to the following authorities in addition to those referred to in the judgment of the Board:— *Musammat Ram Kuer* v. *Musammat Patraj Kuer,*[10] *Pherai* v. *Pudai Ram,*[11] *Gaura* v. *Ram Charan,*[12] *Ramsekhar Prasad Singh* v *Mathura Lal,*[13] *Sarat Lakshi Dassya* v. *Narendra Singha Neogi Choudhuri*[14] and *Maung Sin* v. *Ma Tok.*[15]

The respondents were not represented at the hearing.

21st June, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The only question in this appeal is as to the date upon which the principal money became due

1. (1915) I.L.R. 37 A. 400 (F.B.).
2. (1922) I.L.R. 45 A. 27 (F.B.).
3. (1926) L.R. 53 I.A. 187: I.L.R. 48 A. 457 (P.C.).
4 (1916) I.L.R. 39 M. 981: 31 M.L.J. 865.
5 (1925) 49 M.L.J. 394.
6. (1843) 4 Q.B. 519.
7. (1891) 2 Q.B. 509.
8 (1876) L.R. 3 I.A. 1: I.L.R. 1 Cal. 163 (P.C.).
9. A.I.R. 1928 Mad 952.
10. (1928) I.L.R. 3 Luck. 439 (F.B.).
11. (1924) 27 Oudh Cas 318.
12. (1927) 4 Oudh W.N. 207.
13. (1925) I.L.R. 4 Pat. 820.
14. (1928) 33 C.W.N. 250.
15. (1927) L.R. 54 I.A. 272. I.L.R. 5 Rang. 422: 53 M.L.J. 22 (P.C.).

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under a mortgage of certain immovable property in the Lucknow District. Upon this hangs an important question of limitation, and the issue of the appeal.

The mortgage is dated the 26th July, 1912, and purports to be for six years from that date. Apart, therefore, from the provisions of a particular clause in the deed, to be presently referred to, the mortgage money would have become due on the 26th July, 1918, and under Art. 132 of the first schedule to the Limitation Act, 1908, the mortgagee would have a further 12 years in which to bring his suit. The Article runs as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
132.—To enforce payment of money charged upon immovable property.	Twelve years ..	When the money sued for becomes due.

The appellant is the mortgagee. He brought a suit praying for a mortgage decree in the usual form on the 28th February, 1928, *i e.*, within 12 years from the 26th July, 1918. He joined as defendants the widow of the mortgagor, who was then dead, and certain puisne encumbrancers, who alone defended the suit. They are respondents to this appeal, but have not been represented before the Board.

The main defence was limitation. The Subordinate Judge of Lucknow, in whose Court the suit was instituted, held that it was out of time, and this decision was affirmed on appeal, first by the District Judge and then by the Chief Court of Oudh. The appellant comes before the Board upon special leave. Other issues raised at the hearing of the suit in the Court of the Subordinate Judge have not been tried.

By the mortgage deed the mortgagor covenanted to pay interest yearly at 12 per cent., and that if the interest for any year was not paid, it should be added to the principal and carry interest at the same rate. Then followed the clause upon which the defence was founded:—

"In case of default, the said creditor shall, at all times, within and after the expiry of the stipulated period of six years aforesaid, have the power to realise the entire mortgage money and the remaining interest and compound interest due to him, in a lump sum, through Court, by attachment and sale of the said mortgaged share, as well as from my person and all other kind of my property, both movable and immovable, together with costs of Court, and I, my heirs, relations and representatives shall have no occasion for objection and refusal; that the aforesaid rate of

interest, fixed by me, shall stand within and after the stipulated period and after the decree till payment of the entire demand hereunder and that I shall at no time demand reduction in interest."

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The mortgagor defaulted in the payment of interest for the first year, and it was contended for the defendants that immediately upon this default the principal moneys became due within the meaning of the article of the Limitation Act set out above, and consequently that the statutory period of 12 years had expired before the institution of the suit. The question their Lordships have to determine is whether this view, upon which the judgments under appeal are all based, is correct.

Clauses of this nature in mortgage deeds have been before the Indian Courts in many cases, and there has been a considerable divergence of judicial opinion as to their effect upon limitation. The Chief Court of Oudh, following a majority decision of the Allahabad Full Bench in 1915, had more than once held that in such cases time ran against the mortgagee from the date of the first default, and the judgments in the present case add little to the elucidation of this problem. The Subordinate Judge thought it clear that the clause gave the mortgagee an option either to sue at once or to wait till the expiry of the mortgage term, but he held himself concluded by authority on the question of limitation. The District Judge thought there was no option, and that the mortgagee "was bound to sue" immediately upon default. In the Chief Court, Srivastava, J., noted the conflict of authority, and certain observations of this Board in a recent case, which seemed to throw doubt upon the soundness of the Allahabad decision, but thought it his duty to adhere to the decisions of his own Court so long as they were not definitely overruled. Wazir Hasan, J., agreed, but expressed himself rather more confidently on the principle involved. In his opinion, the right of the mortgagee to enforce payment on default made the principal money immediately payable within the meaning of S. 60 of the Transfer of Property Act, 1882, and therefore entitled the mortgagor to redeem regardless of the six years' term.

The principal authority in favour of the view taken by the Chief Court is the Full Bench case already referred to, *Gaya Din* v. *Jhumman Lal*,[1] in which the opinions of Richards, C.J. and Tudball, J., prevailed over that of Banerji, J. The gist of the majority judgments was that the money became "due" as soon as it could be legally demanded, *i.e.*, upon the first default. The

1. (1915) I.L.R. 37 A. 400 (F.B.).

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Chief Justice fortified himself by extracts from the judgments of the Court of Appeal in this country in *Reeves* v. *Butcher*,[7] which he seems to have regarded as decisive. Banerji, J., took the opposite view. He thought the clause in question was clearly inserted for the benefit of the creditor, and that it was at his option to treat the money as being immediately due or not. He referred to previous Allahabad decisions which seem to support his argument, and in particular to a dictum of this Board in a case decided under the Limitation Act (XIV of 1859), which will be noted presently.

Gaya Din's case[1] seems to have been doubted in subsequent cases in the Allahabad Court, but was affirmed by another Full Bench in 1922, *Shib Dayal* v. *Meharban*.[2]

The authority of these cases is, however, in their Lordships' opinion, weakened by a more recent decision of the same High Court, *Ashiq Husain* v. *Chatar Bhuj*,[16] in which Sir Grimwood Mears, C.J. and Sen, J., refused to extend the principle beyond the limits of the decided cases. Their Lordships think that if, under a clause of this nature, the principal money "becomes due" within the meaning of Art. 132 immediately upon default by the mortgagor in payment of interest or of an instalment, it must equally become due upon the breach of any other condition to which a similar provision is attached.

Turning now to the other High Courts, their Lordships find a Calcutta decision of 1896, which adopts the same line of reasoning as Allahabad: *Sitab Chand Nahar* v. *Hyder Malla*.[17] It has been suggested that the same Court ten years later in *Rup Narain* v. *Gopi Nath*[18] followed a different principle, which would favour the appellant, but this decision was given with reference to another article of the Limitation Act, and is, their Lordships think, of no assistance in the present case. *Sitab Chand's* case[17] was no doubt decided under Act XV of 1877, but the wording of the article in that Act was the same as in the Act of 1908.

No authority has been cited from Bombay,* but the High Court of Madras (*Narna* v. *Ammani Amma*[4]), following the

1. (1915) I.L.R. 37 A. 400 (F.B.).
2. (1922) I.L.R. 45 A. 27 (F.B.).
4. (1916) I.L.R. 39 Mad. 981: 31 M.L.J. 865.
7 (1891) 2 Q.B. 509. 16. (1928) I.L.R. 50 A. 328.
17. (1896) I.L.R. 24 C 281. 18. (1906) 11 C.W.N. 903.

*There appears to have been a case in Bombay, not in the authorised reports, in which the High Court followed *Gaya Din's* case but the judgment adds nothing to the reasoning: See *Shrinivas Laxman Naik* v. *Chanbasapagowda*, A.I.R. 1923 Bom. 201 (2). (Reported also in 25 Bom. L.R. 203 and 72 I.C. 290—*KJR*.).

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judgment of Banerji, J., in the first of the Allahabad Full Bench cases, and the High Court of Patna (*Ganga Bishun* v. *Lala Raghunath*[19]) have taken the opposite view.

Similar questions have been discussed on two occasions before this Board, but in neither case was it necessary to decide the point, though fairly definite indications were given in each of the view the Board was inclined to take.

In *Juneswar Dass* v. *Mahabeer Singh*,[8] a case falling under Act XIV of 1859, a similar argument was put forward for the appellant to that which has prevailed in the Oudh Courts and Allahabad, though it was based upon the application of a six years' period of limitation. The decision was against the appellant on the ground that the period was twelve years and not six. But Sir Montague Smith, who delivered the judgment of the Board, after expressing himself to this effect, continued:

"Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon* [for the appellant] that this suit would have been barred if the limitation of six years under cl. 16 had been applicable to it They think upon the construction of this bond that there would be good reason for holding that the cause of action arose within six years before the commencement of the suit."

It is, their Lordships think, worth noticing that this case was not referred to in *Sitab Chand Nahar* v. *Hyder Malla*.[17] The dictum cited was, however, much relied upon by Banerji, J., in his dissenting judgment in *Gaya Din* v. *Jhumman Lal*.[1]

The question came up for consideration again before the Board, half a century later: *Pancham* v. *Ansar Husain*.[3] In this case the Allahabad High Court had, following the decision in *Gaya Din's* case,[1] dismissed a mortgagee's suit as out of time, it not having been brought within twelve years of the mortgagor's default in payment of an instalment, which gave the mortgagees the right (as in the present case), without waiting for the expiry of the stipulated period, to enforce their security.

The judgment of the Board was delivered by Lord Blanesburgh, and the material portion of it runs as follows:

"Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din* v *Jhumman Lal*,[1] the High Court held

1. (1915) I.L.R. 37 A. 400 (F.B)
3. (1926) L.R. 53 I.A. 187· I.L.R. 48 A. 457 (P.C).
8 (1876) L.R. 3 I.A. 1. I.L.R. 1 C. 163 (P.C).
17. (1896) I.L.R. 24 C. 281 19. (1930) I.L.R. 10 Pat. 173.
*Note—A fuller report of the arguments appears in the Calcutta Report, I.L.R. 1 Cal. 163.

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that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage 'become due,' so that all right of action in respect of the security is finally barred twelve years later, that is, in the present case, on February 21, 1906 All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Art. 132 of the schedule to the Indian Act—a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.

"Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasised and perhaps extended as it has been by a later Full Bench decision to the same effect: see *Shib Dayal* v. *Meharban*[2] Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be, this Board should finally pronounce not only upon the question whether the principle of the two Allahabad decisions above referred to is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents can, as they think, regardless of the general question, be decided on its own special circumstances, which, apparently, the High Court was not concerned to note."

The judgment then proceeds to deal with the "special circumstances" upon which the actual decision turned; they have no relevance to the present case.

It is no doubt true that the question now before the Board was advisedly left open for future discussion, but the considerations referred to by Lord Blanesburgh are of great weight, and it is difficult to find an answer to them. They clearly affected the decision in the latest Allahabad case, but though the judgment in *Pancham's* case[3] was cited in the Chief Court of Oudh, the learned Judges of that Court would make no further attempt at the solution of the problem.

Under these circumstances, it is a matter of great regret to their Lordships that they should now have to pronounce upon these important and difficult questions without the assistance of Counsel for the respondents. But the case has been placed before them very fully and with conspicuous fairness by Mr. Parikh, who appeared for the appellant, and they have given

2. (1922) I.L.R. 45 A. 27 (F.B.).
3. (1926) L.R. 53 I.A. 187: I.L.R. 48 A. 457 (P.C.).

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their most anxious consideration to all the judgments which have been referred to.

Their Lordships think that no valid distinction can be drawn between the material provisions of the deed in the present case and those upon which the judgments in the Allahabad cases were founded, and that the question to be decided is one of principle.

There can be no doubt that, as pointed out by Lord Blanesburgh, a proviso of this nature is inserted in a mortgage deed "exclusively for the benefit of the mortgagees," and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words, by the breach of his contract—the mortgage money becomes immediately "due," it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and *"co instanti,"* as Lord Blanesburgh says, he is entitled to redeem. If the principal money is "due", and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognised by Wazir Hasan, J., in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default: they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not "become due" within the meaning of Art. 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him.

Their Lordships are not greatly oppressed by the authority of *Reeves* v. *Butcher*.[7] It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal; the question for decision

7. (1891) 2 Q.B. 509.

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would have fallen in India, not under Art. 132, but under Art. 75, which is in very special terms; and S. 3 of the statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due, but from the date when the cause of action arose. If in the Indian cases the question were "When did the mortgagee's cause of action arise?"—*i.e.*, when did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions. Judged by the Indian criterion, "when the money sued for became due," upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decrees of all the Oudh Courts should be set aside; and that the suit should be remitted to the Court of the Subordinate Judge for trial of the other issues which have not been decided. The respondents 2—6 must pay the costs of the appellant in both the District Court and the Chief Court, and before this Board. All other costs of the suit will be dealt with upon the further trial.

Solicitors for appellant: *T. L. Wilson & Co.*

Respondents *ex parte.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD THANKERTON, LORD SALVESEN, SIR JOHN WALLIS AND SIR DINSHAH MULLA.

Shiba Prasad Singh .. *Appellant**

v.

Rani Prayag Kumari Debi and others .. *Respondents.*

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Shiba Prasad Singh v. Rani Prayag Kumari Debi.

Hindu Law—Joint undivided family—Ancestral impartible estate—What constitutes separation—Rule of survivorship applicable to ancestral impartible estates—Incorporation of other property with the impartible estate.

Both in the case of an ordinary joint undivided Hindu family and in the case of an ancestral impartible estate, to constitute separation there

*P.C. Appeal No. 7 of 1930. 7th April, 1932

Bengal Appeals Nos. 71, 72 and 79 of 1925.

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Shiba Prasad Singh *v.* Rani Prayag Kumari Debi.

must be a clear and unambiguous declaration by a member of his intention to separate himself from the family. The separation must be a complete separation in worship, in food *and in estate*, and it is not sufficient to show a separation merely in food and worship.

In order to establish that in a Hindu family governed by the Mitakshara an ancestral impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the impartible estate

In the case of an ancestral impartible estate, there is from the very nature of the property no right of partition, and the holder has the power to alienate it *inter vivos* or by will. But for purposes of succession, the estate, though impartible, must be considered as coparcenary property, and the rule of survivorship applicable to ancestral property applies.

Held, accordingly, that in a joint family governed by the Mitakshara, on the death intestate of the last holder of an ancestral impartible estate descendible by the rule of lineal primogeniture, the selection of a successor was to be determined by survivorship, and that the senior member of the family took the estate by survivorship.

It is competent to the holder of an ancestral impartible estate to incorporate as an accretion to the estate other immovable property belonging to him. The property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate, and therefore passes with the estate by survivorship. Whether any such property has in fact been incorporated with the impartible estate depends upon the intention of the holder The crucial test is, did the holder add his other properties to the impartible estate with the *intention* of incorporating them with that estate? But neither movable property nor the income of an ancestral impartible estate can be incorporated with the estate.

Case-law reviewed.

Judgment of the High Court, Calcutta, (42 C.L.J. 280), varied.

Consolidated Appeals Nos 7 of 1930 against a decree, dated the 17th August, 1925, of the High Court, Calcutta, substantially varying a decree, dated the 3rd November, 1921, of the Subordinate Judge of the 24-Parganas at Alipur.

The litigation relates to the succession to the estate of Raja Durga Prasad Singh, who died childless on the 7th March, 1916, leaving his three widows, the plaintiffs-Ranis, him surviving. The defendant, Shiba Prasad Singh, is a remote collateral relative of the deceased Raja.

The chief item of the property of the late Raja was an impartible estate, called the Jheria Raj, situate in the district of Manbhum. The Raja died possessed also of considerable other immovable property, and of cash, jewellery, accumulations, and other movables of large value.

The said Raja Durga Prasad Singh executed a will on the 27th August, 1915, by which he purported to make certain dispositions in favour of his widows, but the document was not proved as a will as required by the Hindu Wills Act, 1870, as read with S. 187 of the Indian Succession Act, 1865.

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Upon the death of the Raja, the defendant Shiba Prasad Singh took possession of the impartible estate of Jheria, and all the other property of the deceased, claiming that it passed to him as joint with the deceased. The plaintiffs-Ranis brought the present suit on the 6th March, 1919, disputing the defendant's title on the ground that he was not joint with the deceased, and that the plaintiffs as widows were entitled to the impartible Jheria estate, and all the movable and immovable properties of their deceased husband, as being his self-acquisitions.

The High Court, concurring with the learned Trial Judge, found that the defendant was joint with the late Raja, and was therefore entitled to succeed to the Jheria impartible estate.

The High Court also decided that certain other items of property were incorporated with the impartible estate and that the defendant took them with the rest of the estate by survivorship.

Against the decree of the High Court, both parties appealed to His Majesty in Council.

The judgment of the High Court will be found reported in 42 C.L.J. 280 and 93 I.C. 385.

During the arguments the following authorities were cited at the Bar in addition to those referred to in the Board's judgment:—

Rajah Rup Singh v. *Rani Baisni*,[1] *Rajah Suraneni Venkata Gopala Narasimha Row* v. *Rajah Suraneni Lakshma Venkama Row*,[2] *Bannoo* v. *Kashee Ram*,[3] *Prit Koer* v. *Mahadeo Pershad Singh*,[4] *Vikrama Deo Maharajulum Garu* v. *Vikrama Deo Garu*,[5] *Muttuvaduganadha Tevar* v. *Periasami Tevar*,[6] *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo*,[7] *The Udayarpalayam Case*,[8] *Mt. Anundee Koonwur* v. *Khedoo Lal*,[9] *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*,[10] *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*,[11] *Doorga Persad Singh* v. *Doorga Konwari*,[12] *Achamnagaru* v. *Nayanivaru*,[13] *Rajkumar Babu Bishun Prakash Narayan Singh* v. *Maharani Janki Koer*,[14] *Rao Kishore Singh* v. *Mt. Gahenabai*,[15] *Tara Kumari* v. *Chaturbhuj Narayan*

1. (1884) L.R. 11 I.A. 149. I.L.R. 7 All. 1 (P.C.).
2 (1869) 13 Moo. I.A. 113.
3. (1877) I.L.R. 3 Cal 315 (P C.).
4. (1894) L.R. 21 I.A. 134. I.L.R. 22 Cal. 85 (P.C).
5. (1919) 37 M.L.J. 188 (P C.).
6. (1896) L.R. 23 I.A. 128: I.L.R. 19 Mad. 451. 6 M.L.J. 149 (P C.).
7. (1879) I.L.R. 5 Cal. 256.
8 (1905) L.R. 32 I.A. 261: I.L.R. 28 Mad. 508: 15 M.L.J. 312 (P.C.).
9. (1872) 14 Moo. I.A. 412.
10. (1861) 9 Moo I.A. 66
11. (1867) 12 Moo. I.A. 1
12 (1878) L.R. 5 I.A. 149: I.L.R. 4 Cal. 190 (P C.).
13. (1881) I.L.R. 4 Mad. 250.
14. (1920) 24 C.W.N. 857 (P.C).
15. (1919) 37 M.L.J. 562 (P.C).

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Singh,[16] *Parbati Kunwar* v. *Chandarpal Kunwar*,[17] *Abdul Hussein Khan* v. *Sona Dero*,[18] *Sahdeo Narain Deo* v. *Kusum Kumari*,[19] *Lakhshmi Devi* v. *Dhatrasu*,[20] *Hurrochundra Mahapatra* v. *Nityanand Man Singh*,[21] *Maharanee Heeranath Kooer* v. *Baboo Burm Narain Singh*,[22] *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*,[23] *Sivagnana Tevar* v. *Periasami*,[24] *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu*[25] and *Ram Nundun Singh* v. *Janki Koer*.[26]

De Gruyther, K.C., *Dunne, K.C.*, *J. M. Parikh* and *S. K. Gupta* (of the Calcutta Bar) for defendant-appellant, Shiba Prasad Singh.

Upjohn, K.C. and *Dube, K.C.* for plaintiffs-Ranis.

7th April, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—The questions involved in these appeals relate to the right of succession to an estate known as the Jheria Raj, situated in the district of Manbhum, and other property, movable and immovable, left by Raja Durga Prasad.

The suit out of which the appeals arise was instituted by the widows of Raja Durga Prasad in the Court of the Subordinate Judge of the 24-Perganas against Shiba Prasad Singh, a distant agnatic relation of the Raja, to recover the estate and other property. On November 3, 1921, the Subordinate Judge passed a decree whereby he allowed the suit in part and dismissed it as to the rest. Both parties appealed to the High Court at Calcutta, and the High Court by its decree, dated August 17, 1925, allowed the appeals in part. From this decree of the High Court both parties have appealed to His Majesty in Council.

The parties are governed by the Mitakshara School of Hindu Law. The Raj is ancient and ancestral, and it is impartible by custom, and succession to it is governed by the rule of lineal primogeniture. The last holder of the estate was Raja Durga Prasad, who died childless on March 7, 1916, leaving three widows and Shiba Prasad Singh, his second cousin.

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16. (1915) L.R. 42 I.A. 192. I.L.R. 42 Cal. 1179. 29 M.L.J. 371 (P.C.).
17. (1909) L.R. 36 I.A. 125: I.L.R. 31 All. 457. 19 M.L.J. 605 (P.C).
18. (1917) L.R. 45 I.A. 10. I.L.R. 45 Cal. 450: 34 M.L.J. 48 (P.C.).
19. (1922) L.R. 50 I.A. 58: I.L.R. 2 Pat. 230· 44 M L J. 476 (P.C.).
20. (1897) L.R. 24 I.A. 118· I.L.R. 20 Mad 256 (P.C.).
21. (1890) L.R. 17 I.A. 128: I.L.R. 18 Cal. 151 (P.C.).
22. (1872) 17 W.R. 316
23. (1870) 13 Moo. I.A. 333.
24. (1878) L.R. 5 I.A. 61: I.L.R. 1 Mad. 312 (P.C.).
25. (1900) L.R. 27 I.A. 151: I.L.R. 24 Mad. 147: 10 M.L.J. 294 (P.C.).
26. (1902) L.R. 29 I.A. 178: I.L.R. 29 Cal. 828 (P.C.).

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The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below:—

- Raja Sangram Singh (d 1836)
  - Raja Udit Narain (d. 1850)
    - Raja Rash Behari Lal (d. 1888)
      - Raja Jaymangal (d. 1899)
      - Raja Durga Prasad (d. 1916)
        1. Rani Prayag Kumari
        2. Rani Subhadra Kumari (died pending the suit)
        Rani Hem Kumari
        (plaintiffs)
  - Nand Kishore (d. 1915)
    - Lal Behari (died before 1915)
      - Janki Prasad (d. 1910)
      - Shiba Prasad Singh (defendant)
  - Brojo Lal (d. 1860)
  - Churaman (d. 1851)

Raja Sangram Singh died in 1836, leaving four sons. The Raj then devolved successively on Raja Udit Narain, Raja Rash Behari Lal, Raja Jaymangal, and Raja Durga Prasad. Shiba Prasad Singh is the great-grandson of Raja Sangram Singh.

On August 27, 1925, Raja Durga Prasad made a will whereby he purported to dispose of some of the properties in dispute. The will is governed by the Hindu Wills Act, 1870. Several sections of the Indian Succession Act, 1865, are thereby made applicable to wills governed by the Act. Amongst them is section 187, which provides that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration with the will . . . . annexed." No executor has been appointed under the will of Raja Durga Prasad nor have any letters of administration with the will annexed been obtained by any person. None of the parties, however, to this litigation seeks to establish any right as a legatee under the will. On the contrary, both parties claimed in the Courts in India, and they claim here, on the footing of intestacy. Their Lordships have been assured by counsel in the case that no person other than the parties to these appeals is interested in the succession to any of the properties in dispute. The will, it may be observed, has been held to be genuine by both the Courts in India.

After the death of the late Raja, Shiba Prasad Singh entered into possession of the estate and other properties.

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Shortly afterwards disputes arose between him and the widows, and on August 5, 1916, three *bantannamas* were executed, one by each widow, whereby for the consideration mentioned in those writings they acknowledged Shiba Prasad Singh as the rightful successor of the late Raja, and relinquished their claim as the heirs of their husband to all properties left by him.

On March 6, 1919, the present suit was brought by the three widows against Shiba Prasad Singh. In their plaint they stated that Raja Udit Narain had separated from his brothers, that they as the heirs of their husband were entitled to succeed to the Raj and all other properties left by him, that the *bantannamas* were obtained by Shiba Prasad Singh by fraud and undue influence, that he had wrongfully taken possession of the Raj and the properties, and they claimed possession and other reliefs. As regards the Raj it was also alleged that if all the three widows together were not entitled to it, at least the senior widow was. The widows are hereinafter referred to as the plaintiffs and Shiba Prasad Singh as the defendant.

The properties in dispute are described in two schedules annexed to the plaint, being Schedule *ka* and Schedule *kha*, which their Lordships were told correspond to the Schedules *ka* and *kha* annexed to the decree of the Subordinate Judge. Schedule *ka* consists of seven items. Schedule *kha* contains a number of items and sub-items. It will be convenient to group these properties under the following heads:—

(1) The impartible estate or Raj	Sch. *ka*, 1.
(2) Immovable properties acquired by Raja Rash Behari Lal, the father, and Raja Jaymangal, the brother, of the late Raja, and come to his hands	Sch. *ka*, 2-7.
(3) Immovable properties acquired by the late Raja	Sch. *kha*, 1-8.
(4) Improvements on the Raj estate	Sch. *kha*, 9-19.
(5) Jewellery	Sch. *kha*, 20 (1-23).
(6) Furnishings and equipments of the palace, etc.	Sch. *kha*, 20 (24-83), etc.
(7) Cash and deposits in banks	Sch. *kha*, 21.

Besides the above, the plaintiffs claimed all other properties, both movable and immovable, left by the late Raja, which might on inquiry be found to have come to the hands of the defendant.

The defendant by his written statement denied that the *bantannamas* were obtained by him by fraud or undue influence.

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He also denied that Raja Udit Narain had separated from his brothers, and alleged that he and the late Raja were, at the time of the Raja's death, members of a joint undivided family, and he claimed the Raj by survivorship. He based his claim to the other properties on a family custom, according to which, it was alleged, all accumulations and acquisitions made by the Raja for the time being passed to his successor together with the Raj. He also claimed those properties on the alternative ground that they had been incorporated with the Raj. There was a further plea that females were excluded by custom from succession to this Raj.

The Subordinate Judge found that the *bantannamas* were obtained by the defendant by fraud and undue influence, and they were set aside. He also found that the two customs alleged by the defendant were not proved. On the issue whether the family was joint, he found that no separation had taken place, and that the defendant and the late Raja were members of a joint family at the time of the Raja's death. All these findings were affirmed by the High Court on appeal.

It is necessary, however, to state here a point of difference between the two Courts as regards the issue as to jointness. One of the elements considered by both the Courts in determining that issue was whether the two branches of the family were joint in worship. The Subordinate Judge found that they were. The High Court, differing from him, found that they were not, but they held that this in itself was not sufficient to constitute a complete separation, and the family, therefore, was still joint.

On his finding that the family was joint, the Subordinate Judge awarded to the defendant the impartible estate [Schedule *ka*, 1], on the ground that he was entitled to it by survivorship, and the improvements on the estate [Schedule *kha*, 9-19], on the ground that they formed part and parcel of the estate. He also awarded to the defendant the self-acquisitions of Raja Rash Behari Lal and Raja Jaymangal [Schedule *ka*, 2-7], on the ground that they were incorporated with the impartible estate. As to the properties acquired by the late Raja [Schedule *kha*, 1-8], he held that they had not been incorporated with the impartible estate, and he awarded them to the plaintiffs. This part of the decree was affirmed by the High Court, but as

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to items 3 to 7 of Schedule *ka* on different grounds. The High Court, while agreeing with the Subordinate Judge that item 2 of Schedule *ka* was incorporated with the estate, held that items 3 to 7 were not. They then proceeded to deal with the whole group of items 2 to 7, and said:

"But properties Nos. 2 to 7 of Schedule *ka* were either the *ancestral* properties or properties which devolved upon Raja Durga Prasad on Raja Jaymangal's death, and we do not think they can be claimed by the plaintiffs as the self-acquisitions of Raja Durga Prasad. If Telo and the other properties which were acquired by Raja Jaymangal were not incorporated with the estate, they would devolve upon his [Raja Jaymangal's] widow, Rani Chalur Kumari, and not upon the plaintiffs. We accordingly agree with the Court below so far as properties 2 to 7 of Schedule *ka* are concerned."

As to the movables, the Subordinate Judge held that the plaintiffs were entitled to all the jewellery, cash and deposits in banks. He also awarded the greater part of sub-items 24 to 83 of item 20 of Schedule *kha* to the plaintiffs. He held that the defendant was also entitled to retain some furniture and other articles. Dealing with this part of the case, he said:

"Plaintiffs are certainly not entitled to the furniture in the European guest house, Dheiya pleasure house, Raja's Khash Cutcherry, Sadar Cutcherry of the Raj estate, and Puruha bungalow. I also do not allow the claim for electric light, *punkhas* and machineries, etc., in the Rajbari, as they would follow the estate."

This part of the decree was affirmed by the High Court subject to certain variations as to sub-items 24 to 83.

The Subordinate Judge had not dealt with the plaintiffs' claim to the rents, royalties and other monies which had accrued in the lifetime of the late Raja, but had been realised by the defendant after his death. The High Court held that these belonged to the plaintiffs.

The High Court also directed an inquiry as to all other movable and immovable property that might have been left by the late Raja and had come to the defendant's hands, and ordered that it should be delivered to the plaintiffs.

From this decree of the High Court both parties have appealed to His Majesty in Council. The defendant is the appellant in the first two appeals (Nos. 71 and 72 of 1925), and the plaintiffs are the appellants in the third appeal (No. 79 of 1925).

The main contention of the plaintiffs before their Lordships was that the Courts below had erred in holding that the family was joint. They maintained that the findings of the two Courts in India on the issue as to jointness were not con-

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current, and that the facts as found by them did not establish that the family was joint, but, on the contrary, that there was a separation; if so, they claimed that they as the heirs of their husband were entitled to the Raj and all other properties.

The defendant relied on what he alleged were the concurrent findings of the Courts below in his favour as to jointness, and urged that if he was entitled to the impartible property as a member of the joint family, he was also entitled to the other properties, both movable and immovable, on the ground either that they passed with the Raj by the family custom alleged by him or they had been incorporated with the impartible estate. Failing these, he maintained that he was entitled at the least to the furnishings and equipments of the palace and other buildings on another ground. This and other subsidiary questions raised by him will be referred to later.

The defendant accepted the concurrent findings against him as to the *bantannamas* and as to the two customs that had been pleaded by him. Eliminating these matters, the principal questions that remain for their Lordships' consideration are as follows:—

First, whether the late Raja and the defendant were, at the time of the Raja's death, members of a joint undivided Hindu family.

Second, whether the holder of an impartible estate has the power to incorporate other properties belonging to him with the estate. And, if so,

Third, whether any such properties had in fact been incorporated with the estate, and, if so, which?

First, as to whether the family was joint. The rules as to what constitutes separation in the case of an ordinary joint family are well established by the decisions of the Board. Generally speaking, "the normal condition of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption" : *Tipperah case.*[1] Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu family. Such a separation may be due to various causes, and the family may yet continue joint in estate: *Suraj Narain* v. *Ikbal Narain.*[2] To

1. (1869) 12 Moo. I. A. 523 at 540.
2. (1912) L.R. 40 I. A. 40 at 46: I. L. R. 35 A. 80: 24 M. L. J. 345 (P.C.).

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constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family: *Girja Bai* v. *Sadashiv Dhundiraj*[3]; *Kawal Nain* v. *Prabhu Lal*[4].

Similar rules have been applied by the Board in the case of impartible estates. Thus in *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*[5] Sir J. Colvile, in discussing whether a document operated as a separation of a joint family in respect of an ancestral impartible estate, said (p. 271):

"There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or transfer any right or contingent right of property which they might have,"

and it was held that the family had not separated in respect of that estate. A similar test was applied in *Jagadamba* v. *Narain Singh*,[6] where their Lordships said:

"The cases of *Girja Bai* v. *Sadashiv Dhundiraj*[3] and *Kawal Nain* v. *Prabhu Lal*[4] are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. The latter case illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate; and, further, that there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking."

The latest case on the subject is *Konammal* v. *Annadana*,[7] a case from Madras. In that case their Lordships, after observing that it had been established by the judgment of the Board in *Baijnath Prashad Singh* v. *Tej Bali Singh*,[8] that an impartible estate must be considered as the joint property of the family for the purposes of succession, and after referring to some of the earlier authorities, said as follows:—

"Those authorities, in their Lordships' opinion, go far to support the inference deduced by Ramesam, J., from an examination of the cases that in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate."

In the present case it was admitted for the plaintiffs that there was no evidence of any intention on the part of the junior

3. (1916) L.R. 43 I.A. 151: I. L. R. 43 C. 1031: 31 M. L. J. 455 (P. C.).
4. (1917) L.R. 44 I.A. 159: I. L. R. 39 A. 496: 33 M. L. J. 42 (P. C.).
5. (1875) L.R. 2 I.A. 263: I. L. R. 1 C. 153 (P. C.).
6. (1922) L.R. 50 I. A. 1: I. L. R. 2 Pat. 319: 44 M. L. J. 503 (P. C.).
7. (1927) L. R. 55 I. A. 114: I. L. R. 51 M. 189: 54 M. L. J. 504 (P. C.).
8. (1921) L. R. 48 I. A. 195: I. L. R. 43 A. 228: 40 M. L. J. 387 (P. C.).

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members of the family to renounce their right of succession to the Raj. The only argument, therefore, open to the plaintiffs was that in the case of an impartible estate a separation merely in food and worship was sufficient to effect a severance of the joint status of the family. But this position could not be maintained in the face of the decision in *Baijnath's* case,[8] as understood by the Board in *Konammal* v. *Annadana.*[7] It was accordingly argued, relying upon *Sartaj Kuari* v. *Deoraj Kuari*,[9] that in the case of an impartible estate there was no co-ownership and therefore no jointness in estate; that *Baijnath's* case[8] did not decide that there was co-ownership even for the purposes of succession; that the interest of a junior member, if any, was only a *spes successionis*, and that there was, therefore, nothing in the case of an impartible estate for the junior members to renounce. Such being the argument, it is necessary to consider what *Baijnath's* case[8] actually decided.

The decisions prior in date to *Baijnath's* case,[8] so far as they are material for the present purpose, fall to be divided into two classes, namely, (1) those relating to succession to an impartible estate, and (2) those relating to other rights in such estate. The first class begins with the *Shivagunga* case[10] in 1863. The question in that case was one of succession to an impartible *zemindary*, the rival claimants being the representatives of a widow and those of the nephews of the last holder. The actual decision proceeded on the ground that the *zemindary* was self-acquired property, but the judgment contains the following passages:—

"The *zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence, if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *zemindary*, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his brother's family, the *zemindary* ought to have passed to one of his widows, and, failing his widows, to a daughter, or descendant of a daughter, preferably to nephews, following the course of succession which the law prescribes for separate estate."

7. (1927) L. R. 55 I. A. 114: I. L. R. 51 M. 189: 54 M. L. J. 504 (P. C.)
8. (1921) L. R. 48 I. A. 195 : I. L. R. 43 A. 228 : 40 M. L. J. 387 (P. C.).
9. (1888) L. R. 15 I.A. 51: I. L. R. 10 A. 272 (P. C.).
10. (1863) 9 Moo. I. A. 543.

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The *Shivagunga* case[10] was governed by the Mitakshara law, and the principle enunciated above was followed by the Board in subsequent Mitakshara cases, where it was held that the selection of a successor in the case of an ancestral impartible estate descendible by primogeniture was to be determined by survivorship.

The second class of cases begins with *Sartaj Kuari* v. *Deoraj Kuari*.[9] In that case the holder of an ancestral impartible estate executed a deed of gift of part of his estate in favour of his younger wife. A suit was brought by the son by his elder wife for a declaration that the estate being ancestral, the Raja had no power to alienate any part of it. The High Court of Allahabad held that the Raja had no power to alienate, but the Board reversed the High Court and upheld the gift. The decision proceeded on the ground that the inability of the father under the general law of the Mitakshara to alienate an ancestral estate arises from the proprietary right which the sons acquire at birth in such an estate, and that this right is so connected with the right to a partition that, where that right does not exist, as where the estate is impartible, the proprietary right falls with it. The *Shivagunga* case[10] and the other cases following it were distinguished on the ground that the question in all those cases was one of succession, and not of alienation, and that all that was decided in those cases was "that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family." The decision in *Sartaj Kuari's* case[9] was followed in the *first Pittapur* case,[11] where the right of the last holder to alienate the estate by will was upheld, and in the *second Pittapur* case,[12] where the right of the junior members of the family to maintenance out of the estate (except by custom) was negatived. Here ends the second class of cases.

Then came *Baijnath's* case in 1921. The contest was as to succession to an ancestral impartible estate. The parties were governed by the Mitakshara law and the family was joint. If the rule of survivorship applicable to ancestral property were

9. (1888) L. R. 15 I. A. 51: I. L. R. 10 A. 272 (P. C.).
10. (1863) 9 Moo. I. A. 543.
11. (1899) L.R. 26 I. A. 83: I.L.R. 22 M. 383: 9 M.L.J. (Suppt.) 1 (P. C.).
12. (1918) L. R. 45 I. A. 148: I. L. R. 41 M. 778: 35 M. L. J. 392 (P. C.).

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applied, the respondent would be entitled to succeed; on the other hand, if the rules of succession to separate property were applied, the appellants would be entitled to succeed. It was argued for the appellants before the Board that *Sartaj Kuari's* case had established that there was no coparcenary in an impartible estate, that that decision was logically extended to the question of maintenance in the *second Pittapur* case, and that it should be equally logically extended to succession ; in other words, that the estate should descend, not as coparcenary, but as separate property. But this argument was not accepted, and it was held that the estate being the ancestral property of the joint family, the successor was to be designated by survivorship. The earlier decisions were examined at great length by the Board, and *Sartaj Kuari's* case was distinguished on the ground that "the right of the other members that was being considered [in that case] was a presently existing right. The chance which each member might have of a succession emerging in his favour was obviously outside the sphere of inquiry." Similar observations were made as to the *second Pittapur* case. It was also observed that it would have been possible to decide *Sartaj Kuari's* case differently if the theory had been accepted that impartibility, being a creature of custom, though incompatible with the right of partition, yet left the general law as to restraint against alienations as it was. Their Lordships consider that the judgment in *Baijnath's* case reaffirmed the earlier decisions of the Board as to succession to an impartible estate.

The question again arose, though in a different form, in *Protap Chandra Deo* v. *Jagadish Chandra Deo*[13] in 1927. In that case the last holder of an ancestral impartible estate died leaving a will whereby he bequeathed the Raj to the respondent. The case was on all fours with the *first Pittapur* case, where the right to alienate such an estate by will was recognised. But it was argued on behalf of the appellant that the will was inoperative, and this was put upon the ground that the judgments of the Board in *Sartaj Kuari's* case and the *first Pittapur* case had proceeded on the view that there was no co-ownership and therefore no right of survivorship in an impartible estate, that that view was inconsistent with *Baijnath's* case, which decided that there was a real right of survivorship and no right, therefore, to alienate by will, and that it was open to the Board to

13. (1927) L. R. 54 I. A. 289: I. L. R. 54 C. 995: 53 M. L. J. 30 (P. C.).

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choose between the two lines of decision, and that the decision in *Baijnath's* case was correct in Hindu Law. But the Board held that there was no inconsistency between the two lines of decisions, and the will was upheld.

The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the *Tipperah* case[1]: "Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom". Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case and the *first Pittapur* case; and so also the third as held in the *second Pittapur* case. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath's* case. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no

1. (1869) 12 Moo. I. A. 523 at 542.

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evidence in this case of any such intention. The plaintiffs, therefore, have failed to prove separation, and the defendant is entitled to succeed to the impartible estate. Being entitled to the estate, he is also entitled to the improvements on the estate, being the immovable properties specified in items 9 to 19 of Schedule *kha*. These improvements, in fact, form part of the impartible estate.

The second question is whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him. Questions of incorporation have been dealt with in several decisions of the Board, but the competency of incorporation was not challenged in any of them. The point, however, was raised in a Madras case which is referred to later. The question now under consideration embraces all other properties in dispute, and it is one of wide importance. It may be as well to consider first what was actually decided in the cases referred to.

The first of them is *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[14]. The contest there was as regards succession to an ancestral impartible estate and 4 *mousahs* that had been purchased on behalf of the last holder out of the savings of the estate. It was contended that the *mousahs* had been incorporated with the estate and therefore passed with the estate. It was in evidence that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate. In dealing with this part of the case, the Board said:

> "Their Lordships do not find in these meagre facts adequate grounds for holding that the Raja intended to incorporate the four *mousahs* with the ancestral estate for the purposes of his succession. The four *mousahs* must therefore follow the rule of the Mitakshara as to self-acquired property."

The next case is *Janki Pershad Singh* v. *Dwarka Pershad Singh*.[15] This was a case under the Oudh Estates Act, 1869. The properties alleged to have been incorporated were all immovable properties. In dealing with the question of incorporation, their Lordships said:

> "As has been pointed out by this Board in the case of *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[14] the question whether properties acquired by an owner become part of the ancestral estate for the purposes of his succession depends on his intention to incorporate the acquisitions with the original estate."

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14. (1902) L. R. 29 I.A. 82: I. L. R. 29 C. 433 (P. C.).
15. (1913) L. R. 40 I. A. 170: I. L. R. 35 A. 391: 25 M. L. J. 34 (P. C.).

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It was held upon the facts of the case that the evidence was not sufficient to establish such an intention.

Similar observations were made in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[16]. Here again the properties were immovable.

The last case cited before their Lordships was *Rani Jagadamba Kumari* v. *Wazir Narain Singh*[17]. In that case the properties alleged to have been incorporated consisted partly of movables and partly of immovables, and had all been acquired by the late Raja out of the income of the Raj. The facts relied upon to show that there was an intention to incorporate were not very different from those in the first case cited above. The High Court of Calcutta held that the whole of the property so acquired, except certain Government promissory notes, represented an accretion to the estate and descended with it. On appeal, the Board held that no part of the property constituted an accretion to the estate. Their Lordships observed that the income of an ancestral impartible estate was the absolute property of the owner of the estate, and not an accretion to the estate, as in the case of an ordinary joint family estate. Referring to the judgment of the High Court, the Board said :

"It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the *corpus*, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property ; but no such considerations necessarily apply to the income from impartible property . . . Whether it be possible in any circumstances to treat movable property as an accretion to a landed estate of this character is a matter not arising for decision. . . . In both *Janki Pershad Singh* v. *Dwarka Pershad Singh*[15] and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[16], the addition of family property to the original raj is considered. Both these cases dealt with property other than movable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired properties, whether the *mauzas*, mortgages or other personal estate, as part of the original raj."

The actual point of the decision in the above case was that where the estate is impartible, no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does

15. (1913) L. R. 40 I. A. 170 : I. L. R. 35 A. 391 : 25 M. L. J. 34 (P. C.).
16. (1916) L.R. 43 I.A. 269 at 281-282 : I.L.R. 38 A. 552 : 31 M.L.J. 804 (P.C.)
17. (1923) L. R. 50 I.A. 1 : I. L. R. 2 Pat, 319 : 44 M. L. J. 503 (P.C.).

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not decide that if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property.

The power of incorporation now under consideration has also been recognised in several cases in India: *Lakshmipathi* v. *Kandasami*[18]; *Ramasami* v. *Sundaralingasami*[19]; *Sarabjit Partap* v. *Indarjit Partap*[20]; *Gurusami* v. *Pandia Chinna Thambiar*[21]. The first of these cases was decided in 1892.

The arguments advanced on behalf of the plaintiffs may now be considered. First, it was said that the estate in this case is one of the estates within Bengal Regulations 11 of 1793 and 10 of 1800, and that there are indications in those Regulations that no addition could be made to those estates. Their Lordships think that neither of these Regulations contains any such indication.

Next, it was argued that there was no principle of law on which the power to incorporate could be supported.

The Mitakshara recognises two modes of devolution according to the nature of the property. Ancestral or joint family property devolves by survivorship; self-acquired property descends to the heirs of the last owner in the order prescribed by the law. The Hindu Law, however, enables persons governed by that law to alter the course of devolution of their property from one channel into another by declaring, expressly or impliedly, their intention to do so. Thus, if a member of a joint family declares his intention to separate from the other members, there is, as already stated, an immediate separation, and his undivided interest in the joint family property will on his death pass not to the surviving members of the family, but to his heirs. Similarly, a Hindu possessing self-acquired property may incorporate it with the joint family property, in which case it will pass on his death not to his heirs, but to the surviving members of the family. The material text of the Mitakshara on this subject is as follows:—"Among unseparated brothers, if the common stock be improved or augmented by any one of them, through agriculture,

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18. (1892) I. L. R. 16 Mad. 54.
19. (1894) I. L. R. 17 Mad. 422 at 444.
20. (1904) I.L.R. 27 All. 203.
21. (1920) I. L. R. 44 Mad. 1 :39 M. L. J. 529.

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commerce or similar means, an equal distribution nevertheless takes place: and a double share is not allotted to the acquirer" (Mit., ch. i, sec. 4, verse 31). This verse means that if a member of a joint family augments joint family property, whatever may be the mode of augmentation, the property which goes to augment the joint family property becomes part of the joint family property, and he is entitled on a partition to an equal share with the other members of the family, and not to a double share as in some other cases dealt with in the preceding verses. This is the verse on which the whole doctrine of merger of estates by the blending of income is founded: *Gooroochurn Doss* v. *Goluckmoney Dossee.*[22]

If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property: *Rajani Kanta Pal* v. *Jaga Mohan Pal.*[23] But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartible estate mixes the income of his self-acquired property with the income of the estate. Blending of income, however, is not the only mode of indicating the intention to incorporate. A member of a joint family may possess self-acquired property which yields no income for the time being, as where it is land not yet brought into cultivation. If he desires to incorporate such property with the joint family property, it may be done by declaring, expressly or impliedly, his intention to do so. The crucial test in all such cases is intention, and the intention may be expressed by the blending of income or in some other way. On the same principle a member of a joint family, who is the holder of an ancestral impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate; by so doing he expresses his intention to alter the course of devolution of the self-acquired property. This, their Lordships think, he is entitled to do, though the ancestral estate is impartible. All that can be said against it is that he may alienate the self-acquired property the moment after the declaration of his intention to incorporate. It is true that he can alienate the property, but that is not because the property still retains the character of self-acquired

22. (1843) 1 Fulton 165 at 173-174.
23. (1923) L.R. 50 I.A. 173 at 178: I.L.R. 50 C. 439: 44 M.L.J. 561 (P.C.).

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property, but because on incorporation with the impartible estate it is impressed with all the incidents of that estate, one of which is that he can alienate it at his pleasure. The mere fact, however, that he may alienate the property after incorporation does not conclude the matter, for he may not alienate it at all. Surely, then, the property will pass not as his separate property, but by survivorship as joint property—devolution by survivorship being another incident of an impartible estate. The fact is that when self-acquired property is incorporated with an ordinary joint family estate, the property so incorporated is impressed with all the incidents which attach to an ordinary joint family estate; and when self-acquired property is incorporated with an ancestral impartible estate, the property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate. The mere possibility, therefore, of the holder alienating the property after incorporation is no reason for denying to him the power which the Hindu Law gives him of changing the mode of descent to his property. Nor is there anything in that rule of law which is inconsistent with the custom of impartibility. Apart, therefore, from the question of succession by primogeniture presently to be considered, their Lordships are of opinion that the holder of an impartible estate is entitled to incorporate other properties belonging to him with that estate.

Lastly, it was argued that the holder of an impartible estate cannot so incorporate his self-acquisitions with the estate as to make them inheritable by the rule of primogeniture. In support of this argument two passages were cited from the *Tagore* case[24] namely, (1) "A private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and the gift must fail, and the inheritance takes place as the law directs"; and (2) "Upon this point it is unnecessary to repeat what has already been said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, differing from that described by the law of the land." Reliance was also placed upon a passage in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*,[25] which is as follows:—

24. (1872) L. R. Sup. Vol. 47 at 65.
25. (1918) L. R. 45 I.A. 134 at 143: I. L. R. 40 A. 470 (P. C.).

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"The Crown has in British India power to grant or to transfer lands, and by the grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon such lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case."

In that case a *taluq* had been granted by the Crown to a Hindu under a *sanad*, subject to descent by primogeniture, and it was held that the grantee could not incorporate other lands with lands comprised in the *taluq*. This decision was followed in a recent case, in *Nawab Mirza Mohammad* v. *Nawab Fakr Jahan Begam*.[26]

On the authority of the above rulings it was argued that to allow the holder of an impartible Raj to incorporate his self-acquisitions with the Raj would be to allow him to impose upon the self-acquisitions a line of descent at variance with the ordinary law applicable to his case. Their Lordships do not think that the principle of the above decisions applies to the present case. The Raj has not been granted by the Crown, nor has any line of descent been prescribed by any *sanad*. It is an ancient ancestral estate. It is impartible by custom. It descends by the rule of primogeniture by a family custom. The family is joint. The parties are governed by the Mitakshara school of Hindu Law. Under that law ancestral property devolves by survivorship to all surviving members of the joint family. In the present case the estate devolves not on all, but only on one member of the family, and that is by virtue of the family custom.

A Hindu family, no doubt, cannot by agreement between its members make a custom for itself of succession to family property at variance with the ordinary law. But where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law. The rule of succession in such a case is recognised by the State as part of the law of the family, though it is no more than the result of a course of conduct of individual subjects of the State constituting the family. "Under the Hindu system of law, clear proof of usage," even if it be a family usage, "will outweigh the written text of the law": *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[27].

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26. (1931) L. R. 59 I. A. 1 : 62 M. L. J. 320 (P. C.).
27. (1868) 12 Moo. I. A. 397 at 436.

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Had the Raj been an estate granted by the Crown under a *sanad* subject to descent by primogeniture, as was the *taluq* in the *Rajendra Bahadur* case, the boundaries as defined by the *sanad* could not have been enlarged by any Raja, nor could he have added other properties to it so as to make them descendable by the rule of primogeniture. But the Raj here is not held under any *sanad*. It is impartible by custom, and it descends by primogeniture by custom. The boundaries, therefore, of such an estate, if they could be circumscribed at all, could only be circumscribed by statute or custom. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom. There is no question of any statute here. Nor is there any evidence of any custom excluding such a power. If so, there is no reason why the Raja could not enlarge the Raj by adding other properties to it. He is not by so doing creating another and a separate estate distinct from the Raj itself. He is not assuming to legislate, nor is he creating another Jheria Raj or any other Raj. If other properties are added to the Raj estate, they will not form a new estate, but will be an accretion to the Raj estate, and will pass, on the death intestate of the last holder, as one entity with that estate. To such a case the rule in the *Tagore* case does not apply, nor the rule in *Rajendra Bahadur's* case. A similar conclusion was reached by the High Court of Madras in *Gurusami* v. *Pandi Chinna Thambiar* already referred to.

None of these considerations, however, apply to movable property. Such property, their Lordships think, cannot form an accretion to an ancestral impartible estate. The income even of such an estate is not an accretion to the estate. As was said by the Board in *Jagadamba Kumari* v. *Narain Singh*[17] "the income when received is the absolute property of the owner of the impartible estate." It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate.

The conclusion to which their Lordships have come on this part of the case is that while immovable property can be incorporated with an impartible estate, movable property cannot.

This leads to the consideration of the third question, whether there was an incorporation in fact. The movables

17. (1923) L. R. 50 I. A. 1: I. L. R. 2 Pat. 319: 44 M. L. J. 503 (P. C.).

having been excluded, the enquiry under this head is confined to immovable properties only. These are properties that were acquired by Raja Rash Behari Lal and Raja Jaymangal, being items 2 to 7 of Schedule *ka*, and those acquired by the late Raja, being items 1 to 8 of Schedule *kha*.

Considerable evidence, both oral and documentary, was produced before the Subordinate Judge on this part of the case. The defendant also relied upon the will of the late Raja as evidence of past incorporation. Both the Courts in India held that there was no indication in the will of any past incorporation. The Subordinate Judge held upon other evidence in the case that items 2 to 7 of Schedule *ka* were incorporated with the estate, and awarded them to the defendant. The High Court found that item 2 only was incorporated, but items 3 to 7 were not. These they awarded to the defendant upon other grounds already stated. Those are legal grounds founded upon facts unconnected with incorporation. In the view which their Lordships take of this branch of the case, it is unnecessary to consider whether they are good grounds. All that their Lordships need say is that they are highly debatable grounds.

Both Courts concurred in holding that items 1 to 8 of Schedule *kha* were not incorporated with the estate, and they awarded them to the plaintiffs.

It was argued on behalf of the defendant before their Lordships that the will contained unmistakable indications of a past incorporation with the impartible estate of all immovable properties which the late Raja possessed at the date of the will, and reliance was placed on the second paragraph of the will. That paragraph is in these terms :—

"The entire Parganas, Jheria and Jainagar, in the district of Manbhum, are my ancestral *zemindaries* in respect of which revenue is payable to Government, and besides these I have other immovable properties in Manbhum and other districts. Whoever will be my heir on my death, shall get the said properties, and it is not necessary to make any direction with regard to them. But six annas of the diamonds and other jewelleries, gold and silver, etc., mentioned in the schedule hereto, which I have, and those which I shall purchase hereafter besides these, and all cash moneys, notes, gold and silver, etc., which will be there in my own *Tehbil* or in the Bank of Bengal or any other bank at the time of my death, shall form part of my *zemindary*, and whoever will get the *zemindary* at any time shall possess and enjoy the same, and my wives (those who will be living at the time of my death) shall get the remaining ten annas of the said diamonds, and other jewelleries, the notes, cash moneys, silver and gold, etc., in equal shares, and they shall have absolute right of ownership thereto, that is to say, they shall be competent to give away and sell the same at their pleasure and no one shall ever be competent to object thereto.'

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The opening sentence of the above passage relates to the Jheria Raj and other immovable properties. As to all these the Raja says, "Whoever will be my heir on my death shall get the said properties, and it is not necessary to make any direction with regard to them." He then goes on to say: "*But* six annas of the diamonds and other jewelleries," etc. In other words, as their Lordships read it, the Raja says that it is not necessary to give any testamentary directions as to the immovable properties: they will go as a matter of course to the next heir to the Raj; *but* it is necessary to give such directions as to diamonds and other jewellery, etc. This, their Lordships think, is the only reasonable interpretation that can be put upon those words. They indicate that the Raja had, before he made this document, treated the immovable properties as part of the Raj. The word "but" brings into contrast the immovable properties, as to which he says it is not necessary to give any directions, with diamonds and other jewellery, as to which he proceeds to give testamentary directions. The words "shall get the said properties" in this part of the document are not, in their Lordships' view, words of disposition; they are equivalent to "will get the said properties." The only inference that can be drawn from this part of the document is that the Raja had treated the immovable properties which he then possessed as part of the Raj and that they were incorporated with the Raj estate. Their Lordships may add, to prevent any misconception, that had they considered on the construction of the document that the passage relating to immovable properties contained a testamentary disposition of those properties, their Lordships could not have given any effect to it, as the document has not been proved as a will.

For the reasons stated above, their Lordships are of opinion that the defendant is entitled not only to items 2 to 7 of Schedule *ka*, but also to items 1 to 8 of Schedule *kha*, and that the Courts in India were wrong in rejecting his claim as to the latter items.

The High Court by its decree has directed an enquiry as to whether the late Raja left any other immovable properties acquired by him, and ordered that if any such be found, the defendant should deliver them to the plaintiffs. In view of the opinion already expressed by their Lordships and having regard to the terms of the will, this part of the decree must be varied

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by declaring that such of these properties as might have been acquired by the late Raja on or before the date of the will will pass to the defendant, but those acquired after that date will pass to the plaintiffs, unless it is shown by the defendant that they were added by the late Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant.

Their Lordships will now turn to the subsidiary questions raised by the defendant in regard to movables and to accounts.

The defendant recovered after the death of the late Raja rents, royalties and other monies that had accrued due to the Raja in his lifetime. The decree of the Subordinate Judge is silent as to these items. The High Court, on appeal, awarded them to the plaintiffs. As to these items, the defendant urged before their Lordships that no claim for them was made in the plaint, and that even if it was, the Court of the Subordinate Judge who tried the case had no jurisdiction to entertain the claim. On the question of jurisdiction it was argued that the suit was essentially one for the recovery of immovable property within the meaning of S. 16 of the Code of Civil Procedure, and that no cause of action in respect of the rents, royalties and other monies could be joined with a claim for such property without the leave of the Court in view of the provisions of O. 2, R. 4 of Schedule I to the Code. The material part of that rule is as follows:—

"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except . . . (*c*) claims in which the relief sought is based on the same cause of action."

Their Lordships think that both these contentions must fail. The claim is sufficiently covered by the plaint, and it was fully considered by the High Court. As to jurisdiction, their Lordships are of opinion that the cause of action in respect of the rents, royalties and other items was the same as that in respect of the immovable properties, namely, wrongful withholding of possession by the defendant, and that the case falls under clause (*c*) of R. 4.

One other matter on which there is controversy between the parties is as to an item of Rs. 48,249-3-9, alleged to have been paid by the defendant to the plaintiffs at the time of the execution of the *bantannamas*. The *bantannamas* were executed

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on August 5, 1916. Two schedules are attached to each *bantannama*, Schedule I purporting to be a list of jewellery, cash and deposits in banks left by the late Raja, and Schedule II showing the shares allotted to each party. All three *bantannamas*, including the schedules, are similar in terms. It appears from Schedule II that eight items of jewellery, Rs. 448,400-4-0 out of the deposits in banks, and Rs. 112,249-3-9 out of the cash were allotted to the plaintiffs. From the last item a sum of Rs. 64,000 was deducted, which left Rs. 48,249-3-9 to be paid to the plaintiffs, and it is this item which is now in dispute. As to the Rs. 64,000, it was stated in the *bantannamas* that this money was in a safe which was in the possession of the plaintiffs, and that it had been agreed between the parties that the plaintiffs should retain it and that it should be deducted out of the plaintiffs' share in the cash. As to the deposits, it was arranged that they should be divided when received from the banks.

The defendant alleged that the jewellery that came to the plaintiffs' share was made over to them in the morning of August 5, 1916, and that the sum of Rs. 48,249-3-9 was paid to them in the evening of that day. The plaintiffs denied receipt of any jewellery or cash. They also denied that the safe contained Rs. 64,000 or any other sum. A vast mass of evidence, both oral and documentary, was recorded by the Subordinate Judge on this branch of the case. The Subordinate Judge prefaces his judgment by characterising all oral evidence in the case as "untruthful or biased," except the evidence of Colonel Brown, who, however, did not depose to any of the facts now in dispute. The Subordinate Judge then says: "I shall not rely upon oral evidence unless it is corroborated by documentary evidence, or unless under the circumstances disclosed in the particular matter under investigation it seems to be natural and probable." He found that no jewellery was given to the plaintiffs nor was there any sum of Rs. 64,000 in the safe, as alleged by the defendant. As to the item of Rs. 48,249-3-9, however, he found that it was paid to the plaintiffs. On appeal, the High Court, while agreeing with the Subordinate Judge as to the findings in respect of jewellery and Rs. 64,000, differed from him on the finding as to the Rs. 48,249-3-9, and found that the amount was not paid. The defendant contends that this finding of the High Court is erroneous.

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It is in evidence that the *bantannamas* were executed by the plaintiffs behind a *purdah* in a room in the *Andar-mehal*, and that the only person amongst those present who had access to the plaintiffs was Pran Krishna, a brother-in-law of the second plaintiff. The defendant's case is that Rs. 48,000 was paid in currency notes of Rs. 1,000 each, and that the balance of Rs. 249-3-9 was paid partly in small notes and partly in cash, that he gave the notes and the cash to Pran Krishna, when the *bantannamas* were executed, for payment to the plaintiffs, and that Pran Krishna paid the whole amount to the plaintiffs behind the *purdah*. Pran Krishna was not called as a witness; nor is the fact of payment endorsed by the Sub-Registrar, who was present at the time, on the *bantannamas*, probably because the money was not paid in his presence, nor was any admission of receipt of consideration made in his presence.

It has been the practice of this Raj for several years past to keep a register of currency notes. This register contains entries of notes with their numbers received by the Raja from banks against cheques drawn by him, and entries also of payment out of notes and their numbers. The entries in the register relating to the 48 notes alleged to have been handed over to the plaintiffs were exhibited at the trial of the case.

It appears that certain properties belonging to one Sinha had been sold in execution of a mortgage decree obtained by T. Lal and S. Lal against him in the Court at Bhagalpur. The mortgagor raised money by selling the properties to Thakur Prasad, a son of a sister of the third plaintiff. The sale deed was executed on October 26, 1916, and the purchase money, which consisted of currency notes, was paid to the pleader of the decree-holders. These notes were sent by the decree-holders to the Benares Bank at Bhagalpur and they were credited to their account with the bank. It appears from the register of the bank that 26 of these notes bear the same numbers as 26 out of the 48 notes in the Raja's register. The halves of five of these notes, which are preserved in the Currency Office, purport to bear the signature of the third plaintiff on the back. It was admitted by the first plaintiff, who was examined on commission, that the third plaintiff sent a lakh of rupees in currency notes with a messenger from Jheria for payment of the purchase money on behalf of Thakur Prasad. Behari Lal De, a

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Tehsildar in the employ of the Jheria Raj, deposed that the signature on each of the five halves was the signature of the third plaintiff. The third plaintiff did not give evidence in the case.

The plaintiffs being *Purdanashin* ladies, the onus was on the defendant to prove the payment, but the identity of 26 notes having been established, and the signature on five of them having been sworn to as being the signature of the third plaintiff, the burden shifted upon the plaintiffs, and it was then for them to show that these notes came into the hands of the third plaintiff, not in the way alleged by the defendant, but in some other way, and that the signature on the five notes was not her signature. But no adequate explanation is forthcoming as to the identity of the notes, nor is there any denial of the signatures by the third plaintiff. It appears to their Lordships that the evidence of the *Tehsildar*, standing uncontradicted as it does, is fatal to the plaintiffs' case. The only criticism made against it was that he, having admitted that he had never seen the plaintiffs in the *Andar-mehal*, could not have seen the third plaintiff sign, and he could not therefore know her signature. But a signature may be proved in other ways, and that is what was done in this case. As to the identity of the notes, it was argued that the share of the third plaintiff being one-third, she could not have received, even if the 48 notes had been handed over to the plaintiffs, more than 16 notes, while the notes alleged to bear the same numbers were no less than 26. As against that, however, there is this fact, that no less than five halves have been deposed to as bearing her signature, and she has not denied her signature. It was also urged, on the strength of the evidence of the first plaintiff and that of Mukhdeshwar Baral, a Mohurrir, that the plaintiffs used to get from the Raja's treasury large notes in exchange for small notes, and small notes in exchange for large notes. But there is no evidence that any of the notes which bear the signature of the third plaintiff were so obtained. In fact, the plaintiffs are confronted at every point of their case with the signature of the third plaintiff on the five halves. Such being the evidence, their Lordships find themselves unable to agree with the finding of the High Court as to the item of Rs. 48,249-3-9, and they agree with the Subordinate Judge that the amount must be taken to have been paid.

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The defendant also claims credit for the expenses of the funeral and *sradh* ceremonies of the late Raja and for all monies paid by him to the plaintiffs since the death of the Raja. Particulars of this claim appear in part in paragraph 19 of the petition for leave to appeal to His Majesty in Council, and more fully in ground No. 30 of the grounds of appeal. Ground No. 30 is in these terms :

"For that in any case this Honourable Court should have held that the defendant is entitled to get credit for the expenses of the funeral and *Sradh* of late Raja Durga Prasad Singh and for all his debts and liabilities paid by him and also for all monies paid to the plaintiffs in cash since the death of their husband under whatever denomination such payments may have been made, including the sum of Rs. 50,000 paid on the 16th March, 1920, and the aggregate sum of Rs. 44,000 (made up of Rs. 900) a month paid from 5th August, 1916, to the middle of October, 1916, and Rs. 1,500 a month paid from the 28th January, 1920, to the 27th March, 1921."

This was also a ground of appeal to the High Court. The High Court allowed the defendant's claim in respect of the debts and liabilities of the late Raja, but no directions have been given in respect of the other claims.

As to the expenses of the funeral and *sradh* ceremonies, the defendant contended before their Lordships that if the movables left by the late Raja were awarded to the plaintiffs, those expenses should be borne by them. On the other hand, it was urged for the plaintiffs that if the defendant's claim to succeed to the Raj was allowed, he as the successor to the Raj was bound by custom to perform those ceremonies. These are questions of fact on which no evidence appears to have been led by the defendant before the trial Judge. Their Lordships are therefore unable to entertain this claim at this stage.

The facts as to the defendant's claim for monies alleged to have been paid by him to the plaintiffs appear to be as follows :—Shortly after the institution of this suit the plaintiffs applied for the appointment of a receiver. The application terminated in a compromise, and on January 28, 1920, the parties filed a petition containing the terms of the compromise. Paragraph 4 of the petition is as follows:—

"Defendant to pay month by month to each of the plaintiffs Rs. 500 (Rupees five hundred) on account of maintenance from the date hereof. This without prejudice to the rights of the parties as to the amount of maintenance or otherwise *which may be ultimately payable to the plaintiffs.*"

Paragraph 9 is in these terms:

"The defendant will advance to the plaintiffs Rupees two lakhs and fifty thousand out of the money withdrawn by him from the Bank of Bengal in

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part payment of their dues. Defendant will further pay to the plaintiffs a further sum of Rupees fifty thousand on account of arrears of maintenance, but it is expressly agreed between the parties that this amount will be subject to adjustment *when and if the rate of maintenance is ascertained by Court.*"

The decree of the Subordinate Judge directs that credit should be given to the defendant for Rs. 250,000, but no directions are given in the decree either of the Subordinate Judge or of the High Court in regard to the item of Rs. 50,000 or the payments alleged to have been made by the defendant of Rs. 300 per month to each plaintiff under the terms of the *bantannamas* or of Rs. 500 per month under the terms of the compromise.

It is clear that the *bantannamas* having been set aside, the defendant is entitled *prima facie* to a refund of all payments made by him under them. It appears, however, from the judgment of the High Court that the plaintiffs applied to the Court to remand the case to the trial Judge to determine what maintenance they were entitled to, but the defendant objected on the ground that the plaintiffs could not have both the property and maintenance, and the High Court refused to direct any inquiry and left the question of maintenance to be decided in a separate suit.

It does not appear, at least from the judgment, that the defendant at that time asked the High Court to make any order as regards the payments alleged to have been made by him to the plaintiffs. It may be that the High Court intended to leave this question also open. However that may be, their Lordships see no reason why the defendant's claim should not be considered in the present proceedings, and why, if the plaintiffs claim maintenance in addition to the properties awarded to them, their case also should not be considered together with the plaintiffs' claim. A separate suit would involve a repetition of a good many facts already recorded in this suit.

The only question that remains to be considered is as to some of the movables, being the furniture, furnishings and equipments of the palace and other buildings situated in the Manbhum district and elsewhere. The Subordinate Judge, as already stated, awarded to the defendant the furniture in the *cutcherries* and four other buildings on the ground that "they would follow the estate." This decision was affirmed by the

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High Court on appeal. As regards sub-items 24 to 83 of item 20 of Schedule *kha*, the Subordinate Judge awarded the greater part thereof to the plaintiffs. This part of the decree was varied by the High Court to some extent. No reasons are given by either Court in support of its view.

The claim made by the defendant to the movables on the ground that they were incorporated with the impartible estate has failed; and so also the claim based on the ground that all property, whether movable or immovable, left by the last holder passed to the next succeeding Raja by a family custom. The defendant having failed on both these grounds, the movables in question should pass to the plaintiffs in the ordinary course of succession, unless the defendant can establish his claim to them on some other ground. The only ground urged on his behalf was that the very conception of a Raj involved that the Raj should carry with it all such furniture, furnishings and equipments as were necessary for the support of the dignity of the Raja and the gaddi and such as were provided for use and service with the palace and the land and buildings connected with it. Their Lordships are unable to adopt this view. The question is purely one of fact, and there is no evidence on the record to support the claim. The claim could possibly have been founded on custom, but no such custom was alleged or proved. Their Lordships think that the Courts in India were wrong in awarding any of the furniture, furnishings and equipments to the defendant, and that they should all pass to the plaintiffs.

In the result, their Lordships will humbly advise His Majesty that the appeals preferred both by the plaintiffs (No. 79 of 1925) and by the defendant (Nos. 71 and 72 of 1925) should be allowed in part, and that the decree of the High Court be affirmed subject to the following directions and modifications :

(1) That it should be declared that the defendant, and not the plaintiffs, is entitled to the immovable properties specified in items 1 to 8 of Schedule *kha* annexed to the decree of the Subordinate Judge.

(2) That it should be declared that if as a result of the inquiry directed by the High Court by their decree it be found that Raja Durga Prasad left any immovable properties other than those specified in Schedules *ka* and *kha* annexed to the

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decree of the Subordinate Judge, the defendant shall be entitled to such of them as were acquired on or before the date of the Raja's will, dated August 27, 1915, and that the plaintiffs shall be entitled to such of them as were acquired after that date, unless it is shown by the defendant that they were added by the Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant; and that there should be an inquiry to ascertain whether any of them were so incorporated.

(3) That it should be declared that the defendant is entitled to credit for Rs. 48,249-3-9, with interest thereon at the rate of 6 per cent. per annum from August 5, 1916, and that this amount should be deducted from the amount payable by the defendant to the plaintiffs as provided by the decree of the Subordinate Judge.

(4) That it should be declared that the plaintiffs are entitled to all the furniture, furnishings and equipments left by Raja Durga Prasad, and that the defendant should be directed to deliver them to the plaintiffs, or to pay the value thereof as determined by the High Court.

(5) That the case be remitted to the High Court—

(*i*) To inquire into and determine the matters specified in clause (2) above;

(*ii*) To determine whether the defendant is entitled to credit for the amounts, or any of them, alleged to have been paid by him to the plaintiffs, and referred to in ground No. 30 of the grounds of appeal in his petition (No. 71 of 1925) for leave to appeal to His Majesty in Council (other than the expenses of the funeral and *sradh* ceremonies of Raja Durga Prasad), and to determine also any claim that may be made by the plaintiffs in respect of maintenance; and

(*iii*) To give effect to the above declarations and directions.

The plaintiffs will pay one-third of the defendant's costs of all the three appeals. The costs of further proceedings in India will be dealt with by the High Court.

On November 2, 1922, an order in Council was made disposing of two appeals, being Appeals Nos. 2 and 3 of 1922, preferred by the defendant from an order of the High Court, dated February 9, 1922. As to the costs of these two appeals,

liberty was reserved to the parties to apply to His Majesty in Council after the determination of the appeals from the decree of the Subordinate Judge which were then pending in the High Court. The plaintiffs will also pay one-third of the defendant's costs of those appeals.

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Solicitors for plaintiffs: *Watkins and Hunter.*

Solicitors for defendant: *Stanley Johnson and Allen.*

K. J. R. *Decree varied.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

V. V. R. Firm .. *Petitioners* (Assessees)*

v.

The Commissioner of Income-tax, Madras .. *Respondent (Referring Officer).*

F. B. — V. V. R. Firm v. The Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), S. 4—Moneys raised by borrowing and remitted to another branch—Borrowed money repaid out of mixed funds—Remittance, if out of profits or capital—Presumption.

On the 15th January, 1927, the Saigon branch of the petitioners' business, which had considerable accumulated profits but only a small cash balance in hand, in response to an urgent demand from the Rangoon branch, raised a sum of $59,000 by borrowing from local money-lenders and remitted it to Rangoon. Within a few days, the Saigon branch paid off the loans out of the mixed funds of the business, before the return of the loan from Rangoon. The amount was assessed to income-tax and on a case directed to be stated,

Held, that, as the profits of the Saigon business were more than enough to cover the remittance made, the presumption was that the payment was made out of those profits and not out of capital and so the amount was liable to be assessed to income-tax.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

1. I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court, Madras.

2. The petitioners are a firm of bankers carrying on business in Rangoon and several other places in Burma and in Saigon outside British India.

3. For the year 1927-28, the petitioners were assessed by the Income-tax Officer, Second Circle, Karaikudi, on a total income of Rs. 3,54,827 and a taxable income of Rs. 2,62,433. This included

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*O. P. No. 187 of 1929. 16th December, 1931.

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a sum of Rs. 1,40,375 ($1,00,000) which the Income-tax Officer considered to be remittance of profits received by the petitioners in British India from their Saigon business. The facts regarding this remittance are as follows:—

About January, 1927, there was a run on the petitioners' Rangoon business. The petitioners had to raise funds urgently to meet their liabilities at Rangoon. They raised funds in Rangoon and Madras, but as these were not sufficient to meet their Rangoon liabilities, the petitioners who were at Kanadukathan instructed their Saigon agent on the 2nd Thai, Akshaya (15—1—1927) to remit a sum of $1,00,000 to their Rangoon business on the assurance that the sum would be re-paid within a month. The Saigon business had at the time only a cash balance of about $6,000. The agent, therefore, raised moneys partly by collecting such of the debts due to his business as could be collected readily and partly by borrowing from local people (Chetti businesses and others) and remitted $1,00,000 to Rangoon on the 4th Thai, Akshaya (17—1—1927). The sums thus borrowed amounted to $59,000. The Saigon business was in a sound financial condition and had considerable accumulated profits, but all the profits were, naturally, not retained as fluid cash in the firm's coffers; the profits and the original capital were all mixed up and out of these mixed up funds only a sum of about $6,000 happened to be in the cash chest at the time; the balance had all been lent out to various persons. Immediately after the remittance to Rangoon the Saigon business had various sums of money passing through its hands in the course of its business and the agent re-paid out of these sums the loans taken a few days before. He began repaying the loans on the 7th Thai, had re-paid $42,000 by the 12th, and by the end of that month had completely discharged the borrowings. As the profits of the Saigon business were more than enough to cover the remittance made, the Income-tax Officer held that the remittance was one of profit and accordingly included it in the petitioners' assessment. An extract of the Income-tax Officer's order is filed marked Exhibit A.

4. The petitioners appealed to the Assistant Commissioner against the assessment. The Assistant Commissioner confirmed the Income-tax Officer's order on this point. An extract of the Assistant Commissioner's order is filed, marked Exhibit B.

5. The petitioners then applied to my predecessor for a reference to the High Court on certain alleged questions of law. He declined to make a reference for the reasons stated in his order, dated 26th March, 1929. A copy of his order is filed, marked Exhibit C.

6. On the petitioners' application to the High Court under Section 66 (3) for an order directing me to state a case, the High Court has by its order, dated 10th April, 1930, directed me to refer the following question:—

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"Whether from the circumstance that the 59,000 dollars borrowed by the Saigon branch and transferred to Rangoon to the Rangoon branch were re-paid by the Saigon branch to the lenders before a re-transfer of the amount from Rangoon, the Income-tax Commissioner should have drawn the inference that the 59,000 dollars were a remittance from capital rather than from profits."

7. The contention of the petitioners was that because money was borrowed for the purpose the remittance was not one of profits. The Assistant Commissioner held that in the circumstances of the case the borrowing of the money did not affect the question. The borrowing was, as he explained, a "resource operation" or what may be termed a matter of "ways and means". To explain, profits are never kept in the till as ready cash. There is only a small cash balance retained in hand and in the case of a money-lending business all the rest of the funds (whether capital or profits) will be in the shape of loans. When any payment has to be made and particularly if the amount required happens to be large it may not be possible at the short notice available to call in enough of the funds of the business from its debtors; and in cases, for example, where the moneys have been invested elsewhere on term deposits it would even be advantageous not to disturb the deposits until they fall due for re-payment. In such cases money is raised for the time by what means are most readily available, *e.g.*, by temporary loans, overdrafts from the Bank and so on, and the loans are discharged as soon as the business gets its own funds, This is the businessman's way of making payments from his own funds. This is just what happened in the present case. There were considerable profits available in Saigon but they were not in the shape of ready cash in the till. The agent of the business collected as much money as could be collected from its debtors and to make up the balance borrowed money from perons who had money immediately available. These borrowings were re-paid within a short time from the funds of the business and without the agent having to wait for the return of the money from Rangoon. The substance of the transaction was that the business had to make a remittance of a certain sum of money from its own funds. Nothing turns on how it raised the money at the moment for the purpose. I consider that the fact that on a particular date money had to be borrowed for making up a remittance does not impress the remittance with the character of capital.

M. Subbaroya Aiyar for petitioners.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—The following question has been referred to us, viz., "Whether from the circumstance that the 59,000 dollars borrowed by the Saigon branch and transferred to Rangoon to the Rangoon branch were re-paid by

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the Saigon branch to the lenders before a re-transfer of the amount from Rangoon, the Income-tax Commissioner should have drawn the inference that the 59,000 dollars were a remittance from capital rather than from profits."

The facts are that the petitioners carry on banking business in Rangoon and also in Saigon. In January, 1927, there was a run in their business at Rangoon and it was necessary to raise funds for the purpose of discharging their liabilities at that place. Large sums of money were borrowed in British India, but these were insufficient to fully meet the petitioners' liabilities; and the petitioners accordingly instructed their agent in Saigon to borrow money and remit $1,00,000 to their Rangoon agent agreeing to re-pay the amount to the Saigon business within one month. At that time the Saigon business had a cash balance of $6,000 only but it was in a sound financial condition and had considerable accumulated profits. But these were naturally not retained as fluid cash in the firm's coffers. The profits and original capital were all mixed up and out of these mixed up funds only a sum of $6,000 happened to be in the cash chest at the time and the balance had been lent out to various persons. Upon the receipt of instructions from the petitioners the Saigon agent raised the money necessary partly by collecting some of the debts due to the business, such of them as could be collected readily, and partly by borrowing from local Nattukottai Chettis and Chinese money-lenders.

The amount borrowed from the Nattukottai Chettis and Chinese money-lenders was $59,000. This together with the balance making up the $1,00,000 was duly remitted to Rangoon. Within one week of the borrowing of the $59,000 the Saigon agent re-paid the lenders $42,000 and the remaining amount a short time afterwards. The whole of the amount was re-paid within 28 days so that the whole of the debt owing to these persons was re-paid within a month of the money having been lent to the Saigon business. The order of the Commissioner of Income-tax which upheld the Assistant Commissioner's order on appeal which upheld the Income-tax Officer's order, was that the $59,000 were assessable to income-tax as being a remittance to the Rangoon business out of the profits of the Saigon firm. The petitioners' contention here is that this was a remittance of money borrowed, that money borrowed is not profits but represents capital and that it was, therefore, a remittance of the

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Saigon firm's capital to Rangoon and not liable to assessment to income-tax. Ordinarily that contention that borrowed money is not a profit may be a perfectly sound one but the facts in this case show that this was a remittance, as the Income-tax Commissioner has found, not of capital but of profit. There were large sums in the Saigon business, the accumulated profits, more than sufficient to meet the demand made from Rangoon and though they were not actually in the till, they were easily realisable. What really happened was that these were short-term borrowings from money-lenders in Saigon and the sums borrowed were re-paid as before mentioned within a month not by means of any remittance back from Rangoon to Saigon but out of the accumulated profits at Saigon. I say out of the accumulated profits because there were accumulated profits more than sufficient to meet the Rangoon demand; and the legal presumption is that any payments made were made out of those profits and not out of capital; and that presumption has arisen in this case and has not been rebutted by any evidence on the side of the petitioners. The net result of this transaction is that whereas there were sums in the shape of accumulated profits of more than the amount of $59,000 after the repayment of the sums borrowed from the local money-lenders the accumulated profits were reduced by the amount of $59,000 re-paid to the lenders. Under these circumstances, in my view, this was clearly a remittance from Saigon of profits of the Saigon business and as such was liable to assessment to income-tax. Under the circumstances the answer to the question referred must be that the $59,000 were a remittance from profits and not capital. Costs of the respondent Rs. 250.

Ramesam, J.

Ramesam, J.—I agree.

Cornish, J.

Cornish, J.—I agree.

S. R. *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Subbiah Chetty and others .. *Appellants** (*Defendants* 1 *to* 4)

v.

Visalakshi Achi .. *Respondent* (1*st Plaintiff*).

Subbiah Chetty *v.* Visalakshi Achi.

Limitation Act (*IX of* 1908), *Art.* 60—*Stridhanam moneys of a woman converted into a hundi and invested with a firm—Deposit created—Demand on the firm to pay back the amount—Unconditional demand essential to bring the case within Art.* 60 *of the Limitation Act.*

The Stridhanam moneys belonging to a Nattukottai Chetti woman, Plaintiff 1, were converted into a hundi for that amount and invested in 1899 with a firm of Nattukottai Chettis. Her husband, Plaintiff 2, was transacting business on behalf of her. From the circumstances of the case, if the transaction would not amount to the constitution of a trust, at least, it amounted to a deposit under an agreement that it should be payable on demand. Two letters, one in 1920, Ex. I (*a*) and another, Ex. I in 1922, were sent by 2nd plaintiff demanding payment, but whereas Ex. I (*a*) was not an unconditional demand. Ex. I was clearly in unequivocal terms asking for the payment of the entire amount. Having got no satisfaction, the plaintiffs filed a suit in 1925 within three years from the date of Ex. I.

Held, even viewing the transaction as merely a deposit, the suit would be in time within Art. 60 of the Limitation Act where time would run from the date of demand.

In order to satisfy the requirement of Art. 60, a demand should be an unqualified demand for the whole sum due.

Madhavbhai Shivbhai v. *Fattesing Nathubai*, (1873) 10 Bom.H.C.R. 487; *Jogendra Nath Chuckerbutty* v. *Dinkoo Ram Krishna Chittel*, (1920) 25 C.W.N. 981 and *Motigavri* v. *Naranji*, (1926) 29 Bom. L.R. 423, relied upon.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 40 of 1925.

T. R. Venkatarama Sastri, A. C. Sampath Aiyangar and *N. Rajagopala Aiyangar* for appellants.

S. Varadachariar and *S. V. Venugopalachariar* for respondent.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—On the occasion of the 1st plaintiff's marriage to the 2nd plaintiff in 1899 a sum of Rs. 5,454 was given to her by her father's family as *stridhanam*, in accordance with the custom prevailing in the community to which the parties belong, that of Nattukottai Chettis. This sum, together with other small sums representing presents,

*Appeal No. 204 of 1928. 5th May, 1932.

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amounted to Rs. 5,711 on the 27th September, 1899, on which date it was deposited with the firm consisting of her three brothers Raman Chetty, Lakshmanan Chetty and Muthiah Chetty. The evidence shows that a hundi for the amount had been handed to the 2nd plaintiff's father and that he handed it back to these persons for investment in their firm. The partnership constituting this firm lasted until 1915 when there was a partition, the two elder brothers forming a new firm with the Vilasam "S.R.M.S.L." and the third brother Muthiah Chetty another new firm with the Vilasam "S.M.". The assets and liabilities were divided between these two firms in the proportion of 2/3rds to 1/3rd, and the sum of money due to the 1st plaintiff underwent a similar division. It remained in these firms until 1925, notwithstanding certain demands made by the 2nd plaintiff on his wife's behalf. In that year the plaintiffs filed two suits, O. S. No. 39 of 1925 against the one firm and O. S. No. 40 of 1925 against the other. They were tried together and the learned Subordinate Judge has in each given a decree for the amount of the plaintiffs' claim. The defendants in each case preferred an appeal. That arising out of O. S. No. 39 of 1925 (Appeal No. 206 of 1928) has been adjusted. We are now concerned with the appeal preferred by Muthiah Chetty's sons (he having died) against the decree in O. S. No. 40 of 1925.

It is not now contested that the money was deposited in the circumstances alleged by the plaintiffs. The only question which has been argued before us was whether the suit for the re-payment of the money is in time. We have to see in the first place whether when the money came into the hands of the defendants' firm it amounted to an entrustment; and if it did not so amount, whether it was a deposit and, if so, whether the suit would be in time under Article 60 of the Limitation Act. Under the first aspect, it has been suggested, although not very vigorously, that S. 10 of the Limitation Act would apply. That section requires that the property should have become vested in trust for a specific purpose, a phrase which has been held in *Bhurabhai* v. *Rai Ruxmani*,[1] to be merely a more expanded mode of expressing the same idea as that conveyed by the phrase "express trust" in English Law. I do not think that

1. (1908) I. L. R. 32 Bom. 394.

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in the present case it can be said that an express trust was created, nor do the circumstances resemble those dealt with in *Pachaiyappa Chetty* v. *Sivakami Ammal,*[2] in so far as in that case a separate fund, which was held to be a necessary condition for the application of the section, was created. It is then urged that, although S. 10 may not apply, yet the transaction, being between persons who bore a fiduciary relationship to each other, was in the nature of a trust although it might have fallen short of an express trust. The case, it is said, bears a resemblance to that dealt with in *James* v. *Holmes,*[3] where a man with whom a woman was living on intimate terms obtained money from her, it being found that he had received it on the understanding that he would invest it for her benefit. There was there certainly no express trust, but it was held that considering the position of the parties, the relationship in which they stood the one to the other was that of a trustee and of *cestui que trust.* In In re *Richards. Shenstone* v. *Brock*[4] the facts were that a lady handed a promissory note to her solicitor with instructions to pay the amount of it to a female servant, if still in her service at the time of her death. It was held that the solicitor was constituted a trustee of the note for the servant by the circumstance that it was handed to him for the purpose described and with the intention expressed by the lady who gave it. The inference I draw from cases such as these is that the Court on finding that a fiduciary relationship exists will put a wide construction on the expression "trust" rather than regard the transaction in the light of its mere formal characteristics. In *Annamalai Chettiar* v. *A. M. K. C. T. Muthukaruppan Chettiar*[5] it was held by the Privy Council that an equitable claim against a trustee liable to account would fall under Article 120 of the Limitation Act, which provides six years from the date on which the cause of action arose; and it is not disputed that on this view the suit would be within time, there having been an acknowledgment of liability within less than that period before suit.

If it be held that the circumstances do not amount to the constitution of a trust, the only alternative view is that the money was deposited under an agreement that it should be pay-

2. (1925) 49 M.L.J. 468.
3. (1862) 31 L. J. Ch. 567.
4. (1887) 36 Ch. D. 541.
5. (1930) L. R. 58 I.A. 1: I. L. R. 8 Rang. 645: 60 M.L.J. 1 (P.C.).

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able on demand, and under Article 60 time would run from the date when demand was made. There were two written demands, Ex. I (*a*) on the 17th April, 1920 and Ex. I on the 1st April, 1922. Each of these was embodied in a letter written by the 2nd plaintiff. The point has been raised whether a demand made by him would bind his wife and the real owner of the money, but the deposit was made in his name, and since there is evidence that according to the custom of the community he was to transact all business relating to it, I do not think that his competence can be successfully disputed. There is no doubt that the terms of Ex. I are sufficiently explicit to start time running; but that demand was within three years of the suit. There is some reference in this letter to previous demands, which with the exception of Ex. I (*a*) must have been oral. But we have no evidence as to their terms and the defendants have not succeeded in showing that they were more than for sums on account. The case, therefore, turns upon whether Ex. I (*a*) contains such a demand as is contemplated in Article 60. In order to satisfy this requirement a demand must, I think, be an unqualified demand for the whole sum due. That was laid down in *Madhavbhai Shivbhai* v. *Fattesingh Nathubai*[6] in the case of promissory notes. In *Jogendra Nath Chuckerbutty* v. *Dinkoo Ram*[7] it was held that mere requests for money on account would not amount to such a demand and in *Motigavri* v. *Naranji*[8] it was held that time would run from the date on which a demand for the whole balance due had been made. I think that a perusal of Ex. I (*a*) will show that it was not an unconditional demand of this kind. The writer certainly states that he is in need of the money for expenses, but he does not unequivocally demand the whole money, only asking for Rs. 500 to be sent to him and so much as can be collected or is available of the balance to be remitted to his firm in Rangoon. As I read the letter he asks for the payment of the whole if it suits the convenience of his correspondent to pay it, but in any case he asks them to send such money as they may be able to collect. It can hardly be said that nothing short of paying the whole money would be compliance with a request conveyed in this language, and I think it would be unfair to hold that a qualified demand like

6. (1873) 10 Bom. H.C.R. 487. 7. (1920) 25 C.W.N. 981.
8. (1926) 29 Bom. L. R. 423.

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this should cause time to run for the whole amount due. This letter may be compared with the terms of the letter, Ex. I, which is very differently worded and in clearly unequivocal terms. I think accordingly then that even if the transaction is viewed merely as a deposit the suit will be in time. It is upon this ground that the learned Subordinate Judge has answered the question of limitation in plaintiffs' favour, and I agree with his conclusion. I would accordingly dismiss the appeal with costs.

Sundaram Chetty, J.

Sundaram Chetty, J.—I agree.

K. C. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

A. Rm. A. L. A. Arunachalam Chettiar .. *Respondent.*

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The Commissioner of Income-tax, Madras v. Arunachalam Chettiar.

Income-tax Act (XI of 1922), Ss 22 (3) and 28—Incorrect return deliberately made—Revised return filed subsequently—Penalty inflicted in respect of previous return—Legality.

Where the previous return is shown to have been dishonestly made it is open to the Income-tax Officer, while making the assessment on the basis of the revised return, to impose a penalty upon the assessee under S. 28 of the Income-tax Act in respect of the previous return. To such a case S. 22 (3) of the Act has no application ; that section applies only where the assessee makes a *bona fide* discovery that he has made a previous incorrect return.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

1. I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under section 66 (2) of the Income-tax Act, XI of 1922.

2. The petitioner objects to a penalty of Rs. 2,000 imposed on him under S. 28 of the Income-tax Act in the assessment for the year 1928-29. The facts relating to this penalty are as follows:—

The petitioner, an assessee on the file of the Income-tax Officer, Salem, is a Nattukottai Chetti money-lender carrying on business at Rasipuram in the Salem District, Devakottai in the Ramnad District, and Ettiyapuram in the Tinnevelly District. He is also

*O. P. No 148 of 1930. 16th December, 1931.

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a partner in two firms carrying on business at Natham and Nagalapuram in British India and in two other Nattukottai Chetti firms carrying on business at Mysore and Nunjengode outside British India. He is assessed on the income that he derives in British India from property, from dividends and from the businesses carried on whether by himself or in partnership with others in British India and on such of his profits in the firms in the Mysore State as are remitted to him in British India. The last occasion before the assessment now in question when he was assessed on such remittances was in the year 1926-27.

In response to a notice issued under Ss. 22 (2) and 38 of the Income-tax Act for the assessment of the year 1928-29, the petitioner submitted a return on the 22nd of August, 1928, showing the following income:—

	Rs.	A.	P.
Property ..	500	0	0
Income from the money-lending business at Rasipuram, Ettiyapuram and Devakottai ..	38,126	9	3
	38,626	9	3

The notice under sections 22 and 38 was in Form I.T. 10, a specimen copy of which is filed, marked Ex. A. Paragraph 5 of the notice requires that if an assessee represents a Hindu undivided family he should submit with the return a statement giving the names and addresses of the manager and the adult male members of the family. The petitioner did not state that he represented a Hindu undivided family; nor did any statements as required by that paragraph accompany the return.

The Income-tax Officer called upon the petitioner to produce his accounts relating to the Devakottai and Rasipuram businesses for examination on the 21st November, 1928. The accounts were produced on that date and were examined on the 21st, the 23rd and 24th November, 1928. On the 24th November, the Assistant Income-tax Officer who examined the accounts noticed certain entries in the accounts of the Rasipuram business which suggested remittances to the petitioner in British India from the Mysore businesses. The accounts of the firms in Mysore and Nunjengode in which the petitioner was a partner had meanwhile been submitted for examination before the Income-tax Officer, Karaikudi, by another partner in the business who was an assessee on the file of that Officer. That Officer noticed that both profits and remittances were shown in those books under vilasams which had ostensibly no connection with the profits account or the personal accounts of the partners. He communicated this information to the Income-tax Officer, Salem, and also sent for his perusal a statement recorded from the other partner which contained information as to the manner in which the profits and remittances had been concealed. The Income-tax Officer, Salem, directed the petitioner to produce the accounts of the

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Mysore and Nunjengode firms and the accounts of Devakottai on the 1st December, 1928. The books were produced by the petitioner's clerk on that date. A cursory examination of the accounts made in the presence of the clerk showed that remittances had, as the Income-tax Officer, Karaikudi, had noticed, been made under different vilasams. The Income-tax Officer, therefore, wanted to examine the accounts more closely but the petitioner's clerk said that he was ill and could not stay to explain the accounts. The Income-tax Officer, therefore, adjourned the case for further scrutiny of the accounts to the 7th January, 1929. When the accounts were taken up for further examination on the 7th January, 1929, the petitioner filed a "revised return" showing the following income:—

	Rs.	A.	P.	Rs.	A.	P.
Property ..	..			500	0	0
Income from Rasipuram and Ettiyapuram	44,302	0	3			
Remittances from Mysore and Nunjengode ..	34,327	7	9			
	78,629	8	0			
Less loss at Devakottai ..	1,709	13	0			
				76,919	11	0
Share income from firms at Natham and Nagalapuram ..	..			11,263	0	0
Dividends ..	..			16	0	0
Total ..				88,698	11	0

This return differed from the one submitted on the 22nd August, 1928, in two respects The first and the most important was that a sum of Rs. 34,327 being remittances of profits from the firms at Mysore and Nunjengode which had not been shown in the first was shown in this return. The second was that at the head of this second return the petitioner was careful to describe himself as "the Hindu undivided family consisting of himself and his son."

The examination of the accounts was continued and the Income-tax Officer found—

(1) that all the profits of the businesses were not shown in the profits folio, and

(2) that the remittances to the partners were shown under vilasams which to all appearance had no connection with the partners.

Profits.—A considerable portion of the profits had, instead of being taken to the profits folio, been credited in personal accounts under the vilasams அ. ந. and அ. அ. in the Mysore accounts and under the vilasams அ. ந. லெ. and நெ. வ. ந. in the Nunjengode accounts; the expenditure on account of interest had also been inflated by various sums exhibited as having been paid to (or credited to) various creditors represented by the vilasams ஏ. அ.

ஞாக. and க. அஞ. in the Mysore books and the vilasams கா. மு. அரு அ. க. க. and எ. அ. வ. in the Nunjengode accounts. These vilasams, it was found, represented the petitioner.

Remittances.—The remittances to the petitioner had been recorded in folios headed க. அ. ஞ. in the Mysore accounts and எ. அ. வ. in the Nunjengode accounts.

As the accounts had been so maintained that they neither exhibited the profits as profits nor showed the remittances to partners as remittances to them and as there was no guarantee that the Department had succeeded in detecting all the devices adopted by the petitioner to conceal the profits or the remittances the Income-tax Officer declined to accept the result shown by the accounts so far as the firm in Mysore and Nunjengode were concerned and estimated the income from remittances from these businesses to be Rs. 80,000. The Income-tax Officer further levied a penalty of Rs. 2,000 under S. 28 of the Act for the petitioner's omission to declare his income from remittances in his return of income, dated the 22nd August, 1928. The assessment was completed on the 25th February, 1929. In computing the amount of super-tax due, the Income-tax Officer did not make the special allowance which is provided in the Act for a Hindu undivided family but computed the tax on the footing that the petitioner was an individual. A copy of the Income-tax Officer's order is filed, marked Ex. B.

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In his appeal to the Assistant Commissioner the petitioner contended among other things that the assessment made on him as an individual was void in law as he, his son and his grandsons constituted a Hindu undivided family, that he ought to have been assessed as representing the Hindu undivided family and that the Hindu undivided family was entitled to the statutory allowance of Rs. 75,000 in the computation of its income for purposes of super-tax. The Assistant Commissioner accepted the plea that the petitioner represented the family and allowed a deduction of Rs. 75,000 but otherwise dismissed the appeal. A copy of the Assistant Commissioner's order is filed, marked Exhibit C.

The petitioner then applied to my predecessor under S. 66 (2) of the Income-tax Act to refer to the High Court various alleged questions of law said to arise out of the Assistant Commissioner's order. My predecessor considered that as the various vilasams under which the assessee's personal accounts were exhibited in the Mysore and Nunjengode books were found mentioned in the Devakottai (headquarters) books it was not necessary for the Income-tax Officer to have totally rejected the accounts relating to the Mysore and Nunjengode firms. In exercise of his powers under S. 33 he revised the assessment by substituting the figure of remittance shown by the Mysore and Nunjengode books, *viz.*, Rs. 34,327, for the figure adopted by the Income-tax Officer, *viz.*, Rs. 80,000.

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After this decision of my predecessor the only question which remains is one which relates to the penalty, and I refer the following question for the decision of their Lordships:—

> "Whether on the facts of this case the return submitted on the 7th January, 1929, should have been treated as a revised return covered by the provisions of S. 22, sub-section (3) of the Income-tax Act."

The petitioner's contention appears to be that if an assessee omits to show certain income in his return and later submits a "revised return" showing such income before the assessment is made, no matter whether the omission to show it in the first return was deliberate or otherwise, such later return is return covered by the provisions of S. 22 (3) of the Act and secures him immunity from a penalty under section 28. I am of opinion that the section cannot bear this interpretation, because a return filed under this section can be a proper return within its terms only when the assessee *discovers* the omission. In the present case the Income-tax Officer and the Assistant Commissioner have found that the petitioner must have been aware of the understatement of his income when he made the first return and that his omission to show the income from remittances in that return was deliberate. The petitioner is a Nattukottai Chetti familiar with remittances from profits; he has himself been assessed on such remittances in the past; the remittances in question amounted to Rs. 34,327 out of an admitted income of Rs. 88,698; and the remittances had been shown in the accounts not as straightforward remittances to the petitioner but as debits to vilasams which but for the careful scrutiny which was made in this case would have thrown the authorities entirely off the track. I therefore agree with the finding of the authorities below that the omission to show the income in the first return was deliberate and that the petitioner was aware of the understatement at that time. He cannot be said to have discovered later on what he was aware of from the beginning. The Income-tax authorities came to know of the devices adopted and the true import of the vilasams mentioned above on the 24th October, 1928, and the 7th November, 1928, when the accounts of the Mysore and Nunjengode firms were examined at Karaikudi and one of the partners of the firm was examined on oath at that place. The Income-tax Officer, Salem, had this information confirmed when he examined these books on the 1st December, 1928. The petitioner filed the revised return on the 7th January, 1929, after the omission had been *discovered by the Income-tax Officer.* The second return filed by the petitioner on the 7th January, 1929, under the circumstances of this case is in my opinion not a revised return within the meaning of section 22 (3).

M. Patanjali Sastri for Commissioner of Income-tax.

R. Kesava Aiyangar for Assessee.

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Beasley, C.J.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The Commissioner of Income-tax has of his own motion referred to us the following question:—

"Whether on the facts of this case the return submitted on the 7th January, 1929, should have been treated as a revised return covered by the provisions of S. 22 (3) of the Income-tax Act."

The assessee made a return of his income on the 22nd August, 1928. Unfortunately that return was incorrect, not with regard to a small amount but to the extent of Rs. 34,327. The Income-tax Officer has found, and his finding has been upheld by the Assistant Commissioner and the Commissioner of Income-tax, that the omission of that sum was deliberate. We take that to mean that the assessee knew when he made his return that it was false. After the assessee had made that return, the Income-tax Officer, whilst examining some other accounts, made certain discoveries and in the beginning of January, 1929, he appeared to be on the point of discovering this deliberate and fraudulent omission of the assessee. Faced with this impending discovery the assessee put in a revised return on the 7th January, 1929, under S. 22 (3) of the Indian Income-tax Act which reads as follows:—

"If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made in due time under this section."

The Income-tax Officer assessed the assessee to income-tax on his revised return but at the same time inflicted on him a penalty of Rs. 2,000 under S. 28 of the Act owing to the concealment of income. It is argued here that the assessee discovered on the 7th January, 1929, that his previous return was an inaccurate one and that he was, therefore, entitled to claim the benefit of S. 22 (3) and make a revised return and as that has been accepted no penalty can be inflicted upon him for having concealed his income. That certainly is a correct statement of what an assessee is entitled to do, if he makes a *bona fide* discovery that he has made a previous incorrect return but it certainly does not apply to the facts of this case which show clearly that the previous return was deliberately dishonestly made. It is seriously argued that, notwithstanding that fact, the assessee is still enabled to put in a return correcting his

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former inaccurate one and that he is to be absolved from liability to have any penalty inflicted upon him. That, it seems to me, is to put a premium on dishonesty and nowhere in the Income-tax Act do we find any provision which does anything of the kind. The contention that this was a discovery within the meaning of S. 22 (3) is of course futile. As the Income-tax Commissioner points out in his order of reference the assessee did not discover on that day that he had made an incorrect return because at the time when he made his previous return he knew it was incorrect and he could not at any subsequent time have discovered something which he knew at an earlier time. Under these circumstances, the Income-tax authorities were perfectly correct and within their rights in inflicting the penalty upon the assessee. The answer to this question must, therefore, be that, although the later return may, for the purposes of assessability to income-tax, be treated as a revised return under S. 22 (3), the Income-tax authorities are entitled to look at the previous incorrect return and are under S. 28 entitled to inflict a penalty upon the person who has made it. Costs to the Commissioner Rs. 250.

Ramesam, J.

Ramesam, J.—I agree.

Cornish, J.

Cornish, J.—I agree.

B. V. V. *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Jeevakore Bhai .. *Appellant** (*Claimant*)

v.

Krishnadoss Paramanandadoss and another. *Respondents* (*Counter-claimants*).

Jeevakore Bhai *v.* Krishnadoss Paramanandadoss.

Will—Words—Whether dispositive—Construction—Whether absolute estate conferred on a widow—Provision in will for adoption—Whether inconsistent with the absolute nature of the widow's estate.

Where a person ill of body and wishing to make a will while he was in the enjoyment of his understanding wrote a will saying, "It is a long time since a division was made between me and my *pangalis*. They have no right whatever to my properties, namely, the house, ground, jewels, ready money and all immovable and movable properties and all the properties I have been enjoying. But they have only to observe pollution but have no other

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*Appeal No. 219 of 1926. 25th April, 1932.

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rights. Therefore my wife J has the right to my properties and all the properties which I have been enjoying up to this time. No others have the least right thereto, and then proceeded to confer on his wife the power to adopt,

Held, that considering the last clause, in the light of the surrounding circumstances, it is virtually a dispositive clause whereby the testator wanted to confer an absolute estate in his properties on his widow.

Shalig Ram v. *Charanjit Lal*, (1930) L. R. 57 I. A. 282: I. L. R. 11 Lah. 645: 59 M. L. J. 437 (P. C.), relied on.

The giving of an authority to the widow by a will to adopt is not necessarily inconsistent with conferring on her an absolute estate.

Appeal against the order of the District Court of Chingleput, dated 4th December, 1925 and made in O. P. No. 69 of 1925.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. Gopalasami* for appellant.

T. Krishnamachariar and *P. Gangadara Aiyar* for respondents.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—The question which this case raises is as to the manner in which certain proceeds of land acquisition should be dealt with. The claimant is the widow of one Jamnadoss Govardhanadoss and the counter-claimants are his reversioners. The question turns upon whether the widow gets an absolute estate or only a life-estate under a will Jamnadoss Govardhanadoss executed on the 10th December, 1899. This will begins by reciting that being ill in body and wishing to make a will while he is in the enjoyment of his understanding he has written the will, and proceeds as follows:—

"It is a long time since a division was made between me and my *pangalis*. They have no right whatever to my properties, namely, the house, ground, jewels, ready money and all immovable and movable properties and all the properties I have been enjoying. But they have only to observe pollution but have no other rights. Therefore my wife Jukore Bai has the right to my properties and all the properties which I have been enjoying up to this time. No others have the least right thereto."

It then proceeds to authorise the widow to make an adoption if she wishes to do so. The District Judge before whom the reference came has come to the conclusion that this document is not a will at all. He considers that the instrument which was dealt with by their Lordships of the Privy Council in *Jagannatha Bheema Deo* v. *Kunja Behari Deo*[1] affords a parallel. But that was plainly not so because that related to a bare power to adopt and did not make, or purport to make, any reference to the disposition of property whatsoever. He finds

1. (1921) L. R. 48 I. A. 482: I. L. R. 44 M. 733: 41 M. L. J. 648 (P.C.).

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Curgenven, J.

then that if it be a will, the widow takes only a limited estate for the reason that coupled with the disposition of property is an authority to adopt. I do not think that he is right upon the legal aspect of this question because it has been held in *Erram Reddi Chenchu Krishnamma* v. *Maram Reddi Lakshminarayana*[2] that where there is an absolute disposition of property with an authority to adopt, the implied intention of the testator must be that on an adoption being made the widow is divested of the absolute estate, which passes to the adopted son. However, as we have only to discover what was in the testator's mind when he made the will, we need merely concern ourselves with what he might have thought would be the effect of an adoption, and that cannot be discovered by discussing case-law. The only question which caused me some doubt was whether he would not have thought that the power of adoption was ordinarily speaking incompatible with giving his wife an absolute estate and I think that such a combination of provisions would be a rather unusual one for a testator to make. But I am not prepared to say that this can afford us any clear indication as to the dispositive part of the will. On that point it appears to me that two constructions are possible. In the first place, as the portion of the will which I have quoted will show, the testator appears to have been somewhat apprehensive that his coparceners might lay claim to the property on the ground that no partition had taken place and that therefore his status was still one of jointness. That seems to me to be rather indicated by his reference to their having no rights whatever to his property since a division had taken place a long time ago. Then there is the objection that the actual grammatical form in which the reference to the properties descending upon his wife is couched is not dispositive but merely declaratory. He says: "My wife Jukore Bai has the right to my properties," which no doubt can be construed as "will have the right to my properties upon my death," and "no others have the least right thereto". These two features of the will occasioned me a good deal of doubt as to whether he has not merely making a statement, in order to protect his wife's interests, as to what her legal position would be upon his death. But against that there has to be set the circumstances that he not only termed what he was executing a will but also recited, as is ordinarily

2. (1927) 108 I. C. 202.

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done in wills, that he was ill in body but in the possession of his faculties, and I think therefore that a considerable presumption is raised that he intended to do something more than merely define what would be the existing rights of his wife if he died intestate. There is certainly no obligation upon an unskilled draftsman, as in this case the testator appears to have been, to select words which must be clearly dispositive in grammatical effect and although no actual cases have been put before us in which a phrase of this sort has been discussed and found to be sufficiently dispositive to make the document a will, yet in some cases such, for instance, as *Parkash* v. *Chandar Parkash*[3] and *Chunilal* v. *Bai Muli*[4] the language is very similar in form of expression, though I cite these cases only to show that documents have been drafted in such terms and have been acted upon as wills. I think after a careful consideration of this point that it must be taken that the testator had something more than the intention simply to safeguard the interests of his wife and that he did in fact intend the document to be of testamentary effect.

The second question which then arises is with regard to the estate which his wife would take under it. Judicial opinion has altered very much upon this question and a large number of cases have been rendered obsolete by recent deliverances by the Privy Council upon it. No useful purpose will therefore be served by referring to any case-law that originated before *Shalig Ram* v. *Charanjit Lal*[5] and *Jagmohan Singh* v. *Sri Nath*.[6] The latter of these two cases related to a gift and not a will and the document contained the phrase "from generation to generation"; moreover it was conceded that an absolute estate was given and the only question that arose was whether a power of alienation was included within it. I do not therefore rely upon that case so much as upon *Shalig Ram* v. *Charanjit Lal*,[5] where the trend of recent decisions upon the question of how far it is necessary for a testator in the case of females to express himself with regard to conferring an absolute estate is considered. In that case the phrase used was that the three widows who were eventually to get the property

3. A. I. R. 1932 Lah. 215.
4. (1899) I. L. R. 24 Bom. 420.
5. (1930) L. R. 57 I. A. 282: I. L. R. 11 Lah. 645: 59 M. L. J. 437 (P. C.).
6. (1930) L. R. 57 I. A. 291: 59 M. L. J. 446 (P. C.).

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would be the "heirs" to whatever was left of the property after meeting the expenses. Their Lordships after adverting to the earlier view taken of this question cited a passage from *Bhaidas Shivdas* v. *Bai Gulab*[7] to the effect that, if words were used conferring absolute ownership, a wife would enjoy such ownership unless circumstances or the context were sufficient to show that such an absolute ownership was not intended, and commenting upon this decision they add their view that there was nothing in the circumstances of the case which they had under consideration or in the context to indicate that it was the testator's intention to limit the estate bequeathed to any of the three persons to a life-estate or a limited estate similar to a widow's estate under the law of inheritance. So here, it appears to me that if the words which this will contains are dispositive at all, they are dispositive without restriction and that nothing in them can be pointed to which would go to show that the estate to be enjoyed by the widow was no more than an ordinary woman's estate with reversion. In fact, if the words are dispositive at all, such a construction of the will would mean that no occasion whatever existed for the will to have been made.

In these circumstances I am unable to agree with the learned District Judge either that the instrument is not a will or that there are grounds for holding that it would confer only a limited estate. I would therefore allow the appeal and direct that the money in question be paid to the claimant, who will get her costs in both Courts.

Sundaram Chetty, J.

Sundaram Chetty, J.—I agree with the judgment just now pronounced by my learned brother and wish only to say a few words.

The dispute in this case in respect of the will in question is twofold: (1) Whether it is a will at all, and (2) whether the estate conferred upon the widow of the testator is an absolute estate or only a limited estate of a Hindu widow. As to the first point, the terms of the will have to be considered, in order to see whether there is any dispositive clause or not. The sentences in the will, namely, "My wife Jukore Bai has the right to my properties and all the properties which I have been enjoying up to this time. No others have the least right there-

7. (1921) L. R. 49 I. A. 1: I. L. R. 46 Bom. 153: 42 M. L. J. 385 (P. C.).

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to" may at first sight seem to be of a declaratory nature. But we have to take into consideration the fact that the document is styled as a will both in the beginning and at the end and also the fact that after declaring his status to be that of a divided member or separate owner, the testator proceeds to say that his *dayadies* have only a right to observe pollution and have no other rights whatever. He further says that his wife alone has the sole right to his properties and no others have the least right thereto. Obviously, he seems to have meant that his *dayadies* should have no sort of right whatever in his properties in the sense, that they should not even have the right of reversion after the death of his widow. If that was his intention, necessarily he must have meant to confer an absolute estate on his widow; so that the reversioners would not have the right to take the property on the death of the widow. I may also add that if he only wanted to safeguard the interests of his widow by declaring that he was a separate owner, the further clause that she has the right to his properties would be unnecessary, because even without any such declaration on his part, she would have such a right as a Hindu widow in case her husband dies as a separate owner. There must be some purpose in his laying special emphasis on the fact that she alone has the right to his property and none else has. Considering this clause in the light of the surrounding circumstances, it seems to me that it is virtually a dispositive clause, whereby he wanted to confer an absolute estate in his properties on his widow. As observed by my learned brother, the recent Privy Council decision in *Shalig Ram* v. *Charanjit Lal*[5] would govern this case in the matter of interpreting a clause of this kind as to whether he conferred absolute rights or only a limited estate. In the Privy Council case, with respect to the residue of the estate, the testator declared that his two widows and the widow of his son should be the heirs; in other words, that they should have the right to the residue of the estate. In the present case, the testator has declared that his widow should have the right to his properties. In considering the terms of the will which was the subject of the case before the Privy Council, their Lordships observed that the intention of the testator was to confer upon each of his two widows and

5. (1930) L. R. 57 I. A. 282: I. L. R. 11 Lah. 645: 59 M. L. J. 437 (P. C.).

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his daughter-in-law full proprietary rights in one-third share of the residue of the estate. This decision, I think, is a clear authority in favour of the appellant in the matter of determining the legal consequence of this clause. The authority to adopt given by the testator to his widow under this will is not, in my opinion, inconsistent with the absolute disposition in favour of the widow. Even if the authority to adopt is conferred upon the widow, she can have an absolute estate in the property of the husband till she chooses to make the adoption, and once she exercises that power she must necessarily be divested of her estate in favour of the adopted son. This result would occur even if she has the ordinary estate of a Hindu widow. Once she chooses to exercise the authority given by her husband, she must be divested of her interest in the property, whether it is an absolute estate or a limited one, and therefore the giving of the authority to adopt is not necessarily inconsistent with conferring on her an absolute estate.

As to the nature of the estate conferred upon her by the provisions of the will in question, the trend of the recent decisions clearly goes to show that even in the case of a disposition made in favour of a female, the same rules of construction as are applicable to males must apply and, in the absence of words of restriction or limitation, it must be presumed, as in the case of males, that an absolute estate was intended to be conferred on a female member. In the will in question there are no words of limitation or restriction or express words giving absolute power of alienation. In the absence of restrictive expressions, the same rule must apply and I am therefore of opinion that not only is the document a will, but the disposition thereunder amounts to conferment of an absolute estate on the widow.

I therefore agree to the allowing of this appeal and to the appellant getting the amount in deposit as the sole claimant.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE KRISHNAN PANDALAI.

Marukkolandayammal .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of Salem and another .. *Respondents* (*Defendant and L. R. of 1st Defendant*).

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Madras Revenue Recovery Act (*II of* 1864), *S.* 59—*Applicability—Irregularities in conducting sale and absence of jurisdiction—Distinction between—Notices under Ss.* 25, 27 *and* 36 *addressed to dead person—Sale—Validity of—Suit to set aside.*

There is a clear distinction between irregularities in publishing and conducting the sale in which case the suit must be brought within six months prescribed by S. 59 and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void. In the latter case, S. 59 does not apply

The whole procedure in connection with sale of immovable property is based on the assumption that there is a defaulter living who can receive the notices and avail himself of a chance to avoid the sale of his property by payment of the arrears. So where the village officers knew that the pattadar had long ago died but had not corrected the register and on default of payment, notices of demand, attachment and sale were sent addressed to the dead man and affixed to the property, the sale is void. A suit to set it aside is not subject to the period of limitation prescribed by S. 59 of the Act.

Debi Bakhsh Singh v *Habib Shah,* (1913) L. R. 40 I. A. 151: I. L. R. 35 All. 331: 25 M. L. J. 148 (P. C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 9 of 1925 (A. S. No. 20 of 1925 on the file of the District Court of Salem) preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 368 of 1923.

Salem Ramaswami Aiyar for appellant.

The Government Pleader (*P. Venkataramana Rao*) and *C. V. Harihara Aiyar* for respondents.

The judgment of the Court was delivered by

Krishnan Pandalai, J.

Krishnan Pandalai, J.—The question in this case is whether a sale of land for arrears of revenue under Act II of 1864, all the proceedings in which were conducted after the death of the defaulter in the register and without the prescribed notices being given to any living person as defaulter, is valid. There is no direct authority on the point though it must have occurred frequently.

*S. A. No. 1203 of 1926. 16th March, 1932.

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The facts are not in dispute. Chinnaswami Chetty, who died about 10 years before the suit, was the registered pattadar of field No. 101, 4 acres 79 cents in extent, in Tattampatti village in Krishnagiri Taluq in Salem District. The plaintiff is his widow. He and his widow lived in Kallavi village in Uttankarai Taluq about 10 miles from the property.

After Chinnaswami Chetty's death the register was not corrected as it should have been by the Collector under Regulation XXVI of 1802. But the village officials were content to collect the revenue from the plaintiff who paid it till fasli 1330. In fasli 1331 there was an arrear of Rs. 22-5-4 out of the annual assessment of Rs. 25-12-0. The plaintiff alleged in the suit that the Village Munsif was scheming to acquire the property and with that object made her believe that there would be a remission of revenue that year and hence she did not pay in time and that taking advantage of this the sale was brought about secretly by the Village Munsif at which the 2nd defendant, a cousin of his, bought the land for Rs. 310, a gross under-value. This part of the case is however not accepted by the Lower Courts and is not material. What is material however is that the Village Munsif knew, as found by the lower appellate Court, that the registered pattadar was long ago dead. According to the Act the demand notice and attachment and sale notices could not be issued to his widow unless her name was put on the register. In this state of facts, the demand notice under S. 25 and the notices of attachment under S. 27 and of sale under S. 36 were sent addressed to Chinnaswami Chetty. The return to these notices is what was to be expected. The return to the demand notice, dated 25th January, 1922, reads "As the pattadar is not present this was affixed to the palmyra of the land". To the attachment notice it is that "The pattadar mentioned herein does not reside in the village. Hence the notice was affixed on the land on 14th June, 1922, and proclamation made by tom tom". The sale notice under S. 36 is to the effect that the undermentioned lands selected out of those attached in satisfaction of arrears of land revenue by Chinnaswami Chetty of Tattampatti, the *present* registered landholder and a revenue defaulter, will be sold on 18th July. The return to this notice is that as the pattadar mentioned herein does not reside in the village the notice was affixed on the land and publication made by tom tom and a copy served by affixture on

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the land. The sale took place on 18th July when the 2nd defendant, a cousin of the Village Munsif, was the highest bidder for Rs. 310. The Collector duly confirmed the sale on 21st September, 1922 and put 2nd defendant in possession. The plaintiff on 16th November, 1922 and 28th November, 1922, filed objection petitions to the Collector who rejected them on 9th January, 1923. This suit was brought on 28th July, 1923.

The defence of both defendants was in substance that the sale had been duly conducted under the Act and that whether this is so or not, the suit was barred by limitation as it was not brought within six months from the date of the cause of action. The plea of limitation will not avail unless the sale proceedings were conducted under the Act in accordance with the provisions of the Act in essential procedure such as gives jurisdiction for the sale—*Ravala Nagamma* v. *The Secretary of State for India.*[1] There is a clear distinction between irregularities in publishing and conducting the sale in which case the suit must be brought within the six months prescribed by S. 59 and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void, in which case S. 59 does not apply. A notice under S. 8 in case of movables and under S. 25 in case of immovables is of the latter class. The absence of such notice makes the whole of the subsequent procedure for sale null and void: *Mekaperuma* v. *Collector of Salem*[2] and *Bommayya Naidu* v. *Chidambaram Chettiar.*[3] The Government Pleader relies on *Venkata* v. *Chengadu*[4] for the view that failure to give notice under S. 25 is only an irregularity. But this case has not been followed on this point in subsequent decisions and the better opinion in this Court is as stated above. In *Vadlur Chinna Nagi Reddi* v. *Devineni Venkataramiah*[5] which followed *Venkata* v. *Chengadu*[4] the other cases abovementioned were not referred to It does not appear from the report in *Narayanan Nambudri* v. *Damodaram Nambudri*[6] in what respect the sale was not duly notified and what was the irregularity. The case was really one of alleged fraud in bringing about the sale. In *Rajah Gounden* v.

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1. 1913 M. W. N. 75.
2. (1889) I. L R. 12 M. 445.
3 (1899) I. L. R 22 M. 440 at 446: 9 M. L. J. 190.
4. (1888) 12 M. 168 at 176 (F. B).
5. (1917) 7 L. W. 468.
6. (1893) 4 M. L. J. 79.

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Rajah Gounden[7] the sale was in contravention of Regulation X of 1831 which prohibits the property of minors from being sold for arrears of revenue and it was held that notwithstanding this the sale could not be attacked except in a suit brought within 6 months. This decision is no longer law in view of the Full Bench decision in *Swaminatha Aiyar* v. *Govindaswami Padayachi*[8] that a sale of a minor heir's properties after his father's death for arrears of revenue in contravention of Regulation X of 1831 is *ultra vires*, that this is not cured by the minor's mother's name being entered in the register as the registered pattadar as it is the duty of the Collector under Regulation XXVI of 1802 to enter the name of the minor as the proper owner and that a suit to set aside such a sale is not governed by S. 59 of the Act.

This being the effect of not giving a notice of demand under S. 25, the only point left is whether it makes any difference that a notice was addressed to a dead man and affixed to the property on the wholly futile ground that " the pattadar does not reside in the village " or that he is " not present "? It seems to us that the whole procedure in connection with sale of immovable property is based on the assumption that there is " a defaulter," *i. e.*, in the case of a human being a living person who is in default. It is the duty of the Collector to maintain the land registers correctly. In this case the village officers knew that the pattadar had long ago died and there appears to have been no valid reason why the register was not corrected before the sale of land was decided upon. However that may be, to go through, with the name of a dead man, the procedure intended for giving living men a chance of saving their property is a farce and a futility. The Government Pleader suggested that as it has been held in *Venkanna Iyer* v. *The Secretary of State for India*[9] that the modes of services of the notice mentioned in S. 25 are independent, it is open to the revenue authorities to choose any one of the modes prescribed and that in this case the last mode of affixing the notice to a conspicuous part of the land was selected and that that is a sufficient compliance with the law. In the first place in the decision relied on, both Judges did not lay down the proposition

7. (1893) 4 M. L. J. 85.
8. (1918) I. L. R. 41 M. 733 : 34 M. L. J. 536 (F. B.).
9. 1913 M. W. N. 494.

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contended for, as one of them did not think it necessary to decide it. But whether the modes of service are dependent or independent, we have no doubt that all of them equally contemplate that the defaulter for whose information the notice is intended is alive. The object of sending a notice, however it may be served, is that the person notified may know the thing notified. How can a notice be intended for a dead man? A similar situation to the present arose in *Debi Bakhsh Singh* v. *Habib Shah*[10] in which a suit was dismissed for default of appearance of the plaintiff, the truth being that before the date of hearing the plaintiff had died and on that day his son was engaged in the funeral ceremonies. The Privy Council set aside the order saying that it is vitiated by applying to a dead man orders and rules applicable to a living man. We think that that is the vice of the sale proceedings in this case which in our opinion were of no force and effect by reason of the absence of the fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale, *i. e.*, that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears The sale was therefore void and S. 59 does not stand in the way.

The 2nd respondent asked us in case we held against the sale that the purchase money may be directed to be returned. The Collector will no doubt pass the proper orders in case the sum is still with Government and we need not add that it will be open to him in case of need to take steps in accordance with law to recover any arrears of revenue.

The decrees of the Lower Courts are reversed and the plaintiff will have a decree declaring that the revenue sale, dated 18th July, 1922, of the suit property is void and of no effect and directing the 2nd respondent (2nd defendant) to deliver possession of the property to plaintiff with mesne profits from the date of suit to date of delivery at a rate to be determined in execution. The plaintiff will have her costs throughout from the defendants.

S. R. *Appeal allowed.*

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10. (1913) L. R. 40 I. A. 151 : I. L. R. 35 A. 331: 25 M. L. J. 148 (P. C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Sri Ishwarananda Bharathi Swami .. *Petitioner**

v.

The Board of Commissioners for Hindu Religious Endowments, Madras .. *Respondent.*

Sri Ishwarananda Bharathi Swami *v.* The Board of Commissioners for Hindu Religious Endowments, Madras.

Madras Hindu Religious Endowments Act (I of 1925), S 84 (2)—Application under—Jurisdiction of District Court—Procedure applicable—Right of parties to adduce evidence.

When an application is made to a District Court under S. 84 (2) of the Madras Hindu Religious Endowments Act in respect of a decision arrived at by the Board on the question whether an institution is a math or temple within the meaning of the Act, the jurisdiction of the Court is not restricted to that of an appellate or revisional tribunal and the application being one to which the ordinary procedure of the Court will apply, the parties have the right to produce such evidence as they wish.

Damodaran v *H R. E. Board, Madras,* (1929) I.L.R. 53 Mad. 266: 58 M. L. J. 494 (F. B.) and *Chengashusseri* v. *The Board of Commissioners, H. R. E*, (1931) 61 M L. J. 862, referred to.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of South Kanara, dated 4th April, 1930 and made in O. P. No. 56 of 1928.

B. Sitarama Rao for petitioner.

The Government Pleader (P. Venkataramana Rao) for respondent.

The Court delivered the following

Anantakrishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—This case raises a question of importance. A question was raised before the Board of Commissioners for the Hindu Religious Endowments, Madras, whether the building in which the petitioner resides and in which the worship of the deity Sri Gopalakrishna Devaru is performed was an institution to which the Madras Hindu Religious Endowments Act applies. The Religious Endowments Board by its order, dated 27th April, 1927, decided that the institution was a math within the meaning of the Act, after giving notice to the petitioner and holding an enquiry. The petitioner filed a plaint in the District Court of South Kanara on 17th April, 1928, for a declaration that the building in question is not a math within the meaning of the Act nor an institution to which the Act would apply. He also filed an

*C. R. P. No. 891 of 1930. 22nd February, 1932.

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application (O. P. No. 56 of 1928) to the District Court of South Kanara to modify or set aside the decision passed by the Board, and that application was filed within one year from the 27th April, 1927. The original suit (No. 4 of 1929) as well as the original petition (No. 56 of 1928) were both posted for hearing on the same date in the District Court. The suit was dismissed by the District Court on the preliminary ground that it was barred by the provisions of S. 84 (2) of the Act and that the petitioner's remedy was by means of an application to the Court under that section. Pending disposal of the appeal preferred to the High Court against the decision in O.S. No. 4 of 1929, the hearing of the original petition (No. 56 of 1928) was adjourned. The High Court dismissed the appeal on 4th March, 1931, holding that when by an act of the Legislature, powers are given to any person for a public purpose from which the individual may receive injury, and when the mode of redressing the injury is also pointed out by the statute, as has been done by S. 84 (2) of the Act, viz., by an application to the District Court, a suit for the said purpose is not maintainable. When the suit was pending before the District Court, a commission had been issued to examine a witness, the warrant of commission being headed as issued both in O. S. No. 4 of 1929 and O. P. No. 56 of 1928. When the petitioner applied for extension of time for the return of the warrant, the Court passed the following order on 4th April, 1930:—

"The application for a commission was made in the suit. The suit has been dismissed. In a petition under S. 84, I will not take additional evidence regarding it as an application for revision or as an appeal. Therefore the order for recording the petitioner's evidence on commission is revoked."

The present Civil Revision Petition is against that order of the learned District Judge.

On behalf of the petitioner it was argued that the learned District Judge failed to exercise his jurisdiction in the matter by declining to take evidence, and that he erred in regarding the proceeding before him as an application for revision or as an appeal. It was contended that the proceeding before the District Court was an original proceeding in which the Court had to decide judicially on the rights of the parties, and that the Court was bound to allow evidence which the parties wished to let in to be recorded, following the procedure prescribed by the Code of Civil Procedure in disposing of suits and original

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petitions (applications). Reliance was also placed on the observations made by the Full Bench in the case reported in *Damodaran* v. *H.R.E. Board, Madras*[1], to the effect that "these applications are analogous to a regular suit filed by an unsuccessful claimant" and also on *Chengazhisseri* v. *The Board of Commissioners for Hindu Religious Endowments*[2] in which it was held that the District Court had no jurisdiction under S. 84 (2) of the Act to direct a remand and re-hearing of the case by the Board.

On behalf of the Board, the learned Government Pleader argued that when a dispute arises as to whether an institution is a math or temple as defined in the Act, the Board inquires into the matter, records evidence and then passes its decision, and that the only remedy available to any person affected by such decision is to apply to the District Court to modify or set aside such decision, and that the jurisdiction of the District Court is confined to allow evidence to be taken when there is a lacuna or defect in the evidence recorded or when the Board had erroneously excluded evidence or declined to allow evidence to be adduced or when the Court wants additional evidence to enable it to dispose of the matter. He strongly opposed the view suggested by the petitioner that the proceedings are to be taken *de novo* in the District Court, ignoring the proceedings taken before the Board. He submitted that the proceedings before the Court under S. 84 (2) of the Act are not in the nature of "an original petition," nor of "an original suit," in which the Court would be bound to confine its decision to the evidence adduced therein and he stated that though the Court would have jurisdiction to supplement the evidence that was before the Board in proper cases, the proceedings before the Court was in essence one by way of appeal against the decision passed by the Board. He emphasised on the use of the word "decision" in S. 84, and drew attention to the circumstance that the aggrieved party's remedy was by an "application" to the Court, and not by way of "suit". He pointed out that while some sections of the Act provide for a "suit" being filed in the District Court, some other sections provide for an "application" being filed. He maintained that the Board was a statutory body, that rules and by-laws had been framed for the

1. (1929) I. L. R. 53 Mad. 266 at 269: 58 M. L. J. 494 (F.B.).
2. (1931) 61 M. L. J. 862.

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conduct of proceedings before the Board, that witnesses were examined and evidence taken by the Board, and that it was only after consideration of the whole evidence that the Board passed its "decision" to the effect that the institution in question is a math, and that it is opposed to the whole scheme of the Act to ignore all these proceedings and say that the aggrieved party is entitled to begin a fresh proceeding in the District Court and start investigation from the very beginning, and practically—in the generality of cases—adduce the same evidence that was adduced before the Board. Whether viewed as an appeal or revision, he contended that the petitioner had no unrestricted right to let in evidence, and that the District Judge's order was right.

Mr. B. Sitarama Rao, the learned advocate who appeared for the petitioner, as well as the learned Government Pleader who appeared for the respondent, invited us to certain provisions of the Land Acquisition Act and of the Provincial Insolvency Act with reference to the powers of the Court on applications made to it under certain sections of those Acts; we thought that we are not likely to derive material help in deciding the present matter by reference to those provisions in the other Acts; and we are of the opinion that the question before us should be decided by reference to the provisions contained in the Madras Hindu Religious Endowments Act.

On going through the material sections of the Act to which our attention was drawn, we find that the Legislature has given the Board the right to decide in the first instance whether a particular institution is a math or temple within the meaning of the Act. It is very rarely that the Legislature invests a claimant himself with the right to decide the question in dispute between himself and another. We are not now concerned with the policy of the Legislature. The Legislature has, however, provided for the decision in the first instance by the Board itself on the question whether an institution which is claimed by the Board as a math or a temple coming within the definitions of the Act is such when the same is disputed by the other party. The question now before us is as to the exact nature of the proceedings which the aggrieved party is entitled to take in the District Court under S. 84 of the Act with reference to the decision of the Board. It was argued on behalf of the petitioner that the so-called "decision" is one by the Board in its

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own favour holding that the institution comes within its jurisdiction and powers, and that it is impossible to assume that the Legislature made the Board a judge of its own claims as against a party who contests the same, and that all that the Act provides for is an investigation by the Board of the nature of the institution with a view to deciding whether the Board should withdraw from the matter or not, and that any inquiry made by the Board in such a matter could not be said to be in any way a judicial inquiry by a judicial tribunal. It was argued that the so-called decision is really in the nature of an executive order—and, in any event, a summary order—and that the aggrieved party is entitled to have his rights inquired into and decided by a Civil Court in the ordinary manner.

The matter is an important one, and some of the provisions of the Act are difficult to construe. But after the best consideration I have been able to give to this case, I have come to the conclusion that the contention raised by the petitioner should be upheld.

It was pressed upon us by the learned Government Pleader on behalf of the respondent that the only remedy open to the petitioner is "to apply to the Court to modify or set aside the decision of the Board" as "the order of the Board" is declared to be "final subject to the result of such application". The ordinary right of suit which a party possesses when his legal rights are interfered with is not available to a person in the position of the petitioner, since the Act contains special provisions as to the mode of obtaining relief when a person's rights are interfered with under the Act. It was so decided in a suit between the present parties by the High Court. See *Iswarananda Bharathi Swami* v. *Commissioners, H. R. E. Boards*.[3] Emphasis is laid on the use of the words "apply" and "application" in S. 84, and it was argued that the proper construction of the section is that the aggrieved party is given the right to apply to the Court to exercise powers in the nature of an "appeal" or "revision", as contra-distinguished from the right of "suit". *Prima facie*, this argument is entitled to weight as ordinarily there is a distinction between an "application" and a "suit"; in fact, the Act uses the word "suit" in several sections, 55 (4), 57 (3), 57 (4), 63 (4), 65, 67 (5) and 73, and the word "application" in some other sections, 44, 62, 70

3. (1931) I. L. R. 54 Mad. 928: 61 M. L. J. 117.

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(2), 76 (2), 77 (2), 78 and 84 (2). But an examination of some of the relevant sections of the Act discloses that the Legislature has not clearly kept the distinction in view throughout this Act regarding the use of the word "application".

Turning to S. 53 (3) of the Act, we find the following:—

" A trustee suspended . . . . under this section may, within three months of the date of the communication of the order of suspension, removal or dismissal, appeal to the Board against such order: provided that a hereditary trustee may, in lieu of appealing to the Board, apply within the same period to the Court to modify or cancel the order of the Committee."

In the same sentence we see the words "appeal" and "apply" used,—"appeal" to the Board and "apply" to the Court. If by the term "apply" it was intended that the application is by way of appeal, why should the Legislature not use the word "appeal" in connection with the Court also; why not say, in lieu of appealing to the Board he may appeal to the Court. This is rather significant. Again, in connection with the Board, it is mentioned in the Act that the trustee may appeal to the Board, and nothing is mentioned regarding the reliefs that may be granted by the Board on appeal. One can understand that position. *Prima facie*, and in the absence of anything to the contrary in the enactment creating the right of appeal, the appellate tribunal has got the same powers as the tribunal whose orders are complained against, and the appellate tribunal could confirm, modify, reverse, or pass other orders as it should think fit. The appellate tribunal may reverse the order appealed against and remand the proceedings for fresh disposal. All these powers could be ordinarily exercised when a right of appeal is conferred on a tribunal. But the Legislature has in S. 53 (3) enacted that hereditary trustee may in lieu of "appealing" to the Board "apply" within the same period to the Court to modify or cancel the order of the Committee. Why were the words "modify or cancel" used in connection with the application to the Court, if by the term "application" the Legislature really meant an "appeal". The use of these words in connection with the application to the Court in such cases under S. 84 of the Act formed the basis of the recent decision of this Court in the case reported in *Chengazhisseri* v. *The Board of Commissioners, H. R. E.*[2] There, the

2. (1931) 61 M. L. J. 862.

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learned Judges, Wallace and Madhavan Nair, JJ., observed as follows:—

"In our view the District Court had no authority under S. 84 (2) of the Madras Hindu Religious Endowments Act to direct a remand and rehearing of the case. The powers conferred on the Court by that section are only to modify or set aside the decision of the Board and, of course, to dismiss the application. If the section had meant that the Court was an appellate authority with all the normal powers of an appellate Court, we should expect that to have been stated."

The use of the word "appeal" with reference to the Board, and "apply" with reference to the Court, coupled with the provision that the Court could modify or cancel the order, is *prima facie* a strong indication that the Legislature did not in this section intend to use the two words to connote the same idea. No doubt the word "suit" is used in some sections in connection with the aggrieved parties' right to resort to Court; the aggrieved party is given the right "to institute a suit in Court to modify or set aside particular orders," or, he may "appeal to the Board against such orders". [*See* Ss. 55 (4) and 67 (4)]. The word 'suit' is used in other sections also as already mentioned. The circumstance that under S. 84 the aggrieved party is given the right 'to apply' to Court, and not the right 'to institute a suit', is undoubtedly a very important one; but is it conclusive?

We find there is a provision to the following effect in some of the sections of the Act—"the order of the Court, when such application is made, shall be final". *See* Ss. 76 (3), 53 (4). On the other hand, we find no such qualifying words either in S. 77 or in S. 84, and the omission of these words in those two sections seems to be rather significant. Applications by way of originating summons could be made by trustees to the Court for advice and directions in particular matters. *See* Ss. 34 and 36 of the Indian Trusts Act, for example. It is a question for consideration whether in some of the provisions of the Madras Hindu Religious Endowments Act, the word "application" was not used in that sense—the Court's order being in such cases final and not open to appeal—and whether when in some other sections the word "application" is used, omitting at the same time the words "the order of the Court shall be final," the Legislature did not really mean simply that the aggrieved party may move the Court—*i.e.*, take appropriate proceedings in Court with a view to have particular orders

modified or set aside or cancelled,—not caring to describe the exact technical legal nomenclature of the proceeding to be taken in Court.

It is rather curious that the Legislature has chosen to use two different expressions in connection with an aggrieved person's remedy in the District Court. We have seen that in Ss. 76 and 53, the Legislature has said that "the order of the Court when such application is made shall be final". In Ss. 77 and 84, on the other hand, the Legislature has said that "subject to the result of such application to Court, the order or decision of the Board shall be final". In Ss. 55, 57, 64 and 67 we find the following:—"Subject to the result of such suit, the order shall be final". The question suggests itself whether there is any, and, if so, what difference between saying that "the order of the Court when such application is made shall be final," and saying "subject to the result of such application to Court, the order shall be final". When the Legislature stated that "subject to the result of such suit, the order shall be final," it may be taken that it is the ultimate and final result of the suit by the final appellate authority that was evidently meant. Does the use of the words "subject to the result of such application" in Ss. 77 and 84 suggest any such wider meaning? It is not necessary at present to pursue this line of discussion.

In this connection, I may refer to the circumstance (though by no means a conclusive one) that in Schedule II, column 3 of the Act, the court-fee payable on an application contemplated by S. 84 (2) is "the fee leviable on a plaint under Art. 17, Schedule II, of the Madras Court-Fees Act". Thus court-fee payable on such a proceeding is that payable on a plaint. This circumstance is not, of course, conclusive.

The learned Government Pleader emphasised on the use of the word "decision" of the Board in S. 84 and argued that it is the decision of a judicial tribunal, and that the Legislature obviously meant that though the decision may be called in question by way of appeal to the Court, it should not be ignored and all proceedings preceding it thrown away, as would be the case if the Court has to begin everything *de novo*, according to the contention raised by the petitioner. But I do not think that the use of the word "decision" in S. 84 would by itself be conclusive that it is the opinion arrived at by a judicial tribunal in a judicial manner. The word "decision"

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occurs also in S. 56 (4) of the Act, but it cannot be said that the word "decision" used in S. 56 imports all the above.

It was then contended that the Board inquires into the matter carefully, records evidence, and hears counsel on behalf of the parties interested. While it speaks very well of the Board that the public body takes every reasonable care that its conclusions are arrived at after careful inquiry and consideration, it could not be said that the decision of the Board regarding the matters like the one now before us is the decision of a judicial tribunal arrived at in a judicial manner. The question before the Board was whether the institution in question was a math within the definition of the Act, it being contended on the other side that it was not. The Board would have no jurisdiction over the institution in question unless it be a math. Therefore in a case where the Board claims that it is a math, and is in the position of a claimant while the other party disputes the same, the Board has to decide whether its contentions have been proved. Thus in one sense the Board is to judge on its own claims. It is true that the duty of the Court is only to interpret the statute and give effect to the same, and not to question the policy of the statute. But in considering the effect of an order passed by the Board when the terms of the statute are not clear, it is, I think, legitimate to start with the assumption that, in the absence of a clear provision to the contrary, orders passed by the Board upholding its own claims could have been meant only to be tentative and subject to be agitated before the Civil Courts in the usual way. Several other sections to which our attention was drawn deal with matters where the position of the Board is materially different. Our attention has not been drawn to any specific provision of the Act which clothes orders like the one in question with the characteristics and binding nature of a Civil Court's adjudication. The Board is nowhere expressly styled a judicial body, no section expressly gives it the right to administer oath, nor does any section expressly throw upon it the obligation to decide judicially on the rights of parties as a Civil Court. The Local Government is, no doubt, given power under S. 71 (*e*) of the Act to make rules with reference to the powers of the President and Commissioners of the Board to make inquiries and to compel the production of documents. The Local Government may or may not make such rules, and, in making such rules,

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may restrict the powers of the Board, with reference to those matters, in any way they like. Some of the rules framed by the Local Government were read to us: one of the rules is to the effect, that "it shall not be necessary to take down the evidence of the witnesses in writing at length, but as the examination of each witness proceeds, a memorandum of the substance of what each witness deposes shall be written and signed by the presiding Commissioner, or by the Commissioner, as the case may be, and shall form part of the record." A Civil Court sitting as an appellate tribunal in such matters may find it extremely difficult to properly appreciate the evidence so recorded in such cases. The Board is entitled under S. 19 to make by-laws, among others, as "to the manner in which their decision shall be ascertained otherwise than at meetings." The arrangement by which a decision is arrived at by members of a Board by circulation of papers may have something to recommend it, if considered as an executive or administrative body. But it is ordinarily unknown to the judicial tribunal system, under which personal discussion among members of the tribunal and open argument in public Court by parties or counsel are given very great importance. A decision arrived at by the Board after full inquiry would no doubt be entitled to great consideration, but we do not think that its decision in the present case could be said to be the decision of a judicial tribunal, or that the Legislature treating it like that, has provided only for an appeal to the Civil Court under S. 84 of the Act. It may here be noted that, excepting the President, the other Commissioners of the Board need not necessarily be persons having legal qualifications. *See* S. 12 of the Act. Under the Act the Commissioners are not bound to note the points for decision, the findings thereon, nor the reasons for the same.

As already mentioned, the dispute relates to the very existence of a math in the present case. The Board asserts its existence, whereas the other party denies it. In such a matter, in the absence of clear indication to the contrary in the Act, we should not be justified in holding that the Civil Court which has been given jurisdiction in the matter could only proceed on the materials which were before the Board. The absence in S. 84 of the words "the order of the Court shall be final," which find a place in Ss. 76 and 53 of the Act, seems to indicate that the Legislature pursued a different policy with reference to

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S. 84, evidently having regard to the importance of the nature of the dispute between the parties. It is curious that these words do not find a place in S. 77 of the Act, which deals with the determination by the Board as to what portion of the endowment or property belongs to the religious portion of the institution and what portion to the secular portion of the institution, in a case where the property has been given to an institution which is partly of a religious and partly of a secular character. There also, the Board has to practically decide as between its claims and the claims of another, and so the matter seems to have been dealt with in exactly the same way as in S. 84.

It was further argued for the petitioner that right of suit in the District Court is given by the Act to aggrieved parties in respect of comparatively less important matters, the suggestion being that the right of suit (in effect) in respect of such a vital question, viz., whether an institution in question is a math or not, is not likely to have been withheld. It was also mentioned that the period of *one year* allowed to aggrieved parties to apply to the District Court would rather indicate that the real nature of the proceedings is not "appeal"—as ordinarily understood—the suggestion being that in respect of appeals properly so called, a comparatively shorter period is fixed by the Act in other cases, and that such a long period of one year is not likely to be allowed if the proceedings were considered to be "appeal proceedings", as ordinarily understood. It seems to me that these considerations by themselves would not be conclusive in the absence of other clear indications in the Act itself.

No doubt some of the considerations mentioned above are not of great significance; but having regard to general principles and also to the indications derived from the other portions of the Act, I am inclined to think that the jurisdiction of the District Court in disposing of the matter that comes before it under S. 84 of the Act is not confined to the jurisdiction of the Court of Appeal in the matter of allowing evidence to be adduced. The decision of the learned Judges in the case reported in *Chengazhisseri* v. *The Board of Commissioners, H. R. E.*[2] in so far as it goes, supports this view. Further, I think that there are some observations in the judgment of the

2. (1931) 61 M L. J. 862.

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Full Bench of this Court in the case reported in *Damodaran* v. *H. R. E. Board, Madras*[1] which would directly help us in the decision of the matter before us. The question before the Full Bench was as to the exact amount of court-fee payable on an application made under S. 84 (2) of the Act. At page 269 it was observed:

"These applications are analogous to a regular suit filed by an unsuccessful claimant. They are not really suits for any declaratory decrees The observations of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*[4] may be considered in dealing with a matter like the present."

Thus, the Full Bench, while holding that they are not really suits for any declaratory decrees, in which case court-fee is to be calculated in a different way, was of opinion that an application under S. 84 (2) is "analogous to a regular suit". This opinion of the Full Bench is relevant to the present case, and is of great help to us. If they are analogous to a "regular suit" they could not ordinarily be analogous to "an appeal" or "revision". The Court's powers in respect of taking evidence in proceedings before it are governed by the provisions of the Code of Civil Procedure. In this connection the observation of the House of Lords in *National Telephone Company, Limited* v. *Postmaster-General*[5] are useful; there at page 562 Lord Parker observed as follows:—

"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

See also *Parthasaradhi Naidu* v. *Koteswara Rao*[6].

It might be asked why the words "to modify" or "set aside" such decision occur in S. 84, if a right to question the decision of the Board in the ordinary way in the Civil Court is given to the aggrieved party. If an explanation has to be suggested for the use of the words in the section, it may be said that the words were probably used to make it clear that it is not obligatory on the Civil Court to simply set aside the order of the Board for irregularity, etc., if it should come to the conclu-

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1. (1929) I. L. R. 53 M 266: 58 M. L. J. 494 (F. B).
4. (1907) L. R. 35 I. A. 22: I. L. R. 35 Cal 202: 17 M. L. J. 618 (P. C.).
5. (1913) A. C. 546.
6. (1923) I. L. R. 47 Mad. 369 at 373: 46 M. L. J. 201 (F. B.).

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sion that a modification of the order passed by the Board would represent the real rights of the parties. Compare Article 13 of the first schedule of the Limitation Act with Article 14 of the said schedule. Suits to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent, are well known to law, and the court-fees due on such suits is provided for by Article 17 of the Court-Fees Act, Schedule II.

Finally, it may be noted that under S. 53 (3) of the Act, a hereditary trustee may, in lieu of appealing to the Board, apply to the Court to modify or cancel the order of the Committee. What is the exact nature of the jurisdiction of the Court when dealing with the order of the Committee, (it is not an order of the Board)? Is the Committee also a judicial body? One need not pursue the matter further.

Statutes which limit common law rights must be expressed in clear and unambiguous language; and an illustration given is the case of a statute which detracts from rights of ownership or that which takes away the jurisdiction of the High Court. *See* Halsbury's Laws of England, Vol. 27, pages 150 and 151. The decisions of the Privy Council in the cases reported in *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu Bahadur*[7] and *Secretary of State for India* v. *Chelikani Rama Rao*[8] and of the House of Lords in *National Telephone Company, Limited* v. *Postmaster-General*[5] are not directly useful in solving the exact question before us at this stage of the proceedings. A passage from the judgment of the Privy Council in the case reported in *Secretary of State for India* v. *Chelikani Rama Rao*[8] at page 624 may, however, be cited:

> "The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation"

Section 84 of the Act does not state that the jurisdiction of the Court is by way of appeal from the decision of the Hindu Religious Endowments Board, in the same way as it has described, in other sections of the Act, that the nature of the jurisdiction of the Board is by way of appeal from the orders

5. (1913) A. C. 546.
7. (1914) L. R. 41 I. A. 258: I. L. R. 37 M. 443: 27 M. L. J. 451 (P. C.).
8. (1916) L. R. 43 I. A. 192: I. L. R. 39 M. 617: 31 M. L. J. 324 (P. C.).

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passed by the Committee. We cannot, therefore, uphold the contention that the jurisdiction of the District Court is restricted to that of an appellate tribunal. In a popular sense, it might be said that what the District Court does in such matters is, in a way, similar to an appeal against the decision passed by the Board. Under Act XXVIII of 1860, "an appeal by way of regular suit" before the District Court against the decision of the Survey Officer was provided for. See *Kamaraju* v. *The Secretary of State for India*.[9] It is only in such a sense that the District Court's jurisdiction could be said to be that of an appellate tribunal; but we are concerned here with the question whether the District Court, in proceedings under S. 84 of the Act, has got only the powers of a Court of appeal as provided by the Code of Civil Procedure. As the Legislature has not specifically mentioned that the jurisdiction is by way of appeal from the decision of the Board, but has given the right to the aggrieved party to apply to the District Court to alter or set aside the order, I feel that I am not justified in cutting down the rights of the aggrieved party in his proceedings before the District Court in the absence of any specific provision in the Act to the contrary.

The use of the words "apply" and "application" is not, in my opinion, conclusive in favour of the respondent's contention. In Wharton's Law Lexicon the meaning of the word "application" is given as foilows:—

> " A request, a motion to a Court or Judge,—the disposal of a thing." *See* page 67.

It was observed in *International Financial Society* v *City of Moscow Gas Company*[10] that the word "application" is not inapplicable to the hearing of a suit as well as to an interlocutory proceeding. Thesiger, L. J., observed at page 246 as follows:—

> " The words used in the rule, 'refusal of an application,' are certainly not very happily chosen to express the dismissal of a bill. But at the same time it seems to me that they are wide enough to include it, and that they are equally wide enough while they become appropriate to the refusal of relief applied for in a statement of claim, which is the form of procedure to which this rule is primarily applicable."

The question in that case turned on the construction of O. 58, R. 15 of the Rules of the Supreme Court. The argument of the appellant's counsel (*see* page 243) was this:

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9. (1888) I. L. R 11 Mad. 309 at 310 (F. B.).
10. (1877) 7 Ch. D. 241.

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"An 'application,' as the word is used in the rule, and as it is commonly understood, is made by motion or summons, and when it is refused no formal order need be drawn up at all. . . The decision of the Court on the hearing of the cause is always called in the rules a 'judgment'."

In meeting that argument, James, L. J., observed at page 243 as follows:—

"It is impossible, as it seems to me, to read the word 'application' in any limited sense as an application for an interlocutory order, because it is quite obvious that the rule applies to other than interlocutory orders."

Similarly, Baggallay, L. J., observed at page 246:

"It has been suggested that the word 'application,' as used in the above sentence, has a limited meaning, and that it does not include a motion for decree at the hearing. I can see no ground whatever, in the ordinary grammatical construction of the rule, to give it so limited a meaning, and certainly if we refer to other portions of the Order and the several rules under the Orders, we shall find the word 'application' and the word 'apply' constantly used with reference to every class of application."

Very valuable rights of property are in question. The District Court is given jurisdiction in the matter. The provisions of the Act are not clear that the jurisdiction of the District Court under S. 84 (2) is only that of a Court of appeal or revision. Nor is it clear that the decision of the Board on a matter like this is that of a judicial tribunal, as ordinarily understood, arrived at in the usual judicial manner of Courts? The use of the word "decision" in S. 84 is not conclusive having regard to its use in S. 56 of the Act. Nothing of a conclusive nature could be inferred from the use of the words "apply" and "application" in S. 84. Those words do not seem to have been used in any technical sense in that section, having regard to the use of those words in some other sections of the Act. If the term "suit" had been used in S. 84, the matter would have been conclusive in favour of the petitioner's contention. The omission of the words "the order of the Court shall be final" from Ss. 77 and 84 of the Act, while they are used in some other sections of the Act [*see* Ss. 53 (4) and 76 (3)] with reference to orders passed by the Court on applications would seem to indicate that the nature of the orders passed by the Court under these two sections is different from the nature of orders passed by the Court under the other sections of the Act. The court-fee payable in respect of an application under S. 84 is, under Schedule II of the Act, that payable on a plaint under Article 17 of the Schedule II of the Court Fees Act. A Bench of this Court has held that the District Court in proceedings under S. 84 has no jurisdiction

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to remand the proceedings to the Board for fresh inquiry. The observations in the Full Bench judgment of this Court in the case reported in *Damodaran* v. *H. R. E. Board, Madras*,[1] indicate that the proceedings under S. 84 are "analogous to a regular suit". The use of two different words "appeal" and "apply" in S. 53 of the Act would *prima facie* indicate that they were used to connote two different ideas and not one and the same—the aggrieved person is to "appeal" to the Board, but to "apply" to the Court.

On the other hand, the use of two different expressions "institute a suit" and "apply to the Court" by the Legislature in various sections of the Act would seem *prima facie* to indicate in the contrary direction. I am not now directly concerned with the question whether an appeal lies against the decision passed by the District Court in such a matter, nor as regards the exact nature of such an appeal. Even in the matter of disposing of original applications which involve disputes about valuable legal rights, when they are properly filed in the District Court, that Court has jurisdiction to take evidence and hear arguments before giving its decision; and I am unable to see why it should be different in the case of proceedings taken in Court under S. 84 in the absence of any clear provision to the contrary in the Hindu Religious Endowments Act.

The provisions of the Act, in my opinion, are not clear in this matter; having regard to the considerations mentioned above, could it be said that the application made to the Court under S. 84 is by way of "appeal" or "revision" within the meaning of the Code of Civil Procedure. On the whole, I think that the learned District Judge was in error in regarding the application before him as "an application for revision or as an appeal". His order will accordingly be set aside, and he will be directed to pass fresh orders on the application to take evidence on commission.

Costs of this Revision Petition will be costs in the cause and should be provided for by the District Judge when passing final decision on the proceedings pending before him.

Reilly, J.

Reilly, J.—I agree. I may add that in my opinion the contention of the Board that an application under S. 84 (2) of the Act is only in the nature of an appeal or revision petition, which must be disposed of on evidence taken by the Board, is

1. (1929) I. L. R. 53 Mad. 266: 58 M. L. J. 494 (F. B.).

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obviously untenable unless the decision of the Board under S. 84 (1) is the decision of a judicial tribunal reached by procedure appropriate to a Court of law. It may be noticed that only one of the members of the Board need be a person of any legal training or experience. And the Legislature has not thought fit to prescribe the procedure of the Board in arriving at its decision. There need be no pleadings on record. Evidence need not be given on oath, and none need be recorded. No reason need be given for the decision. No pleader need be heard. The proceedings need not be conducted in public. The Local Government by rules and the Board itself by by-laws have provided for some of these things: but they need not have done so. In my opinion it is impossible to suppose that the Legislature in giving any person affected recourse to the Court against such a decision of such a tribunal intended to restrict the Court to such evidence as the Board might happen to have recorded or even to such evidence supplemented to the extent to which a Court of Appeal can supplement the evidence taken by a Court of first instance. In my opinion the only reasonable interpretation of S. 84 (2) is that the application to be made under the sub-section is, so far as the Court is concerned, an application, to which the ordinary procedure of the Court will apply and on which the parties have the right to produce such evidence as they wish. Not only are the ordinary powers of the Court and the ordinary rights of parties applying to a Court for relief not taken away explicitly; if they did not exist, the remedy provided by the Legislature might well be illusory.

B. V. V. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD WRIGHT, SIR LANCELOT SANDERSON AND SIR DINSHAH MULLA.

P. C.

Erroll Mackay v. Maharajadhiraj Kameshwar Singh.

Erroll Mackay .. *Appellant**

v.

Maharajadhiraj Kameshwar Singh and another .. *Respondents.*

Contract Act (I of 1872), S 73—Contract for sale of goods—Breach of—Measure of damages.

*P. C. Appeal No. 9 of 1931. 16th June, 1932.
Patna Appeal No. 45 of 1929.

P. C.

Erroll Mackay v. Maharajadhiraj Kameshwar Singh.

In assessing damages against the seller for breach of contract for the sale and delivery of goods, if there was an available market for the goods at the date of breach, the damages must be based on the difference between that market price and the contract price.

Appeal No. 9 of 1931 from two judgments of the High Court, Patna, dated the 7th May, 1928 and the 28th May, 1929, affirming, but with material variation, two judgments f the Subordinate Judge of Purnea, dated the 12th March, 1924 and the 21st July, 1928.

The suit giving rise to the appeal was brought by the plaintiff-appellant against the defendant-respondent for damages for breach of a contract for the sale of a quantity of indigo seed. The High Court, applying the rule in *Grebert-Borgins* v. *Nugent*,[1] awarded Rs. 850 as damages, and also ordered the refund of Rs. 1000, earnest money.

Against the said decree of the High Court, the plaintiff appealed to His Majesty in Council.

J. D. Casswell for appellant.

Dunne, K. C. and *Wallach* for 1st respondent.

16th June, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The questions in this appeal are whether the first respondent, who was substituted for his father as defendant on the latter's death, is responsible in damages and if so, in what sum to the appellant, who was plaintiff in the action. The claim was on a contract, dated the 9th November, 1919, for the sale of 200 maunds of new crop Java indigo seed at Rs. 22 a maund excluding bags, f.o.r. Purnea railway station, delivery to be made in April, 1920, the plaintiff paying (as in fact he did) on the date of the contract Rs. 1000 as earnest money. The first question is whether that contract was made, as it purported to be made, by one Hervey (who was on the plaint joined as a defendant in the suit, but was dismissed from it on 12th March, 1924) as agent for the defendant, who will be hereafter referred to under the description of respondent, which term will be applied equally both to the original and the substituted defendant. Hervey was at the date of the contract manager of the respondent's factory at Kajah; it was denied that he had actual or implied authority to make the contract.

1. (1885) 15 Q. B. D. 85.

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Lord Wright.

Their Lordships are of opinion that this contention is not now open to the respondent, since it involves a question of fact which has now been concluded by the concurrent findings of two Courts: that Hervey had authority has been held first by the Subordinate Judge of Purnea and then by the Judges of the High Court of Patna. There was ample evidence before the Courts that Hervey had made in the past for the respondent similar contracts, which had been duly carried out, and also that it was in the ordinary course of an employment such as his to make such contracts for his employer. No question of law was involved. Indeed, the argument on behalf of the respondent on this aspect of the case seems to have been that the actual contract, made as it was before the extent of the then next succeeding indigo crop on the Kajah estate could be foreseen (because the crop is not harvested until between February and April), was speculative and improvident from the standpoint of his employer's interest rather than that it was unauthorised as against outside dealers. Their Lordships are of opinion that the contract must now be held to be a valid contract binding the respondent.

The respondent failed to make any deliveries either by the end of April, 1920, or at all. The question then is, what are the damages, that is, at what date are they to be estimated and on what basis. Hervey had left the respondent's service in December, 1919, and was succeeded by C. J. Berrill. The appellant wrote on the 3rd May, 1920, to Berrill pressing for delivery, and again on the 10th May, 1920, to the "Manager, Kajah concern". On the 2nd June, 1920, he received a reply requesting him to send a copy of the contract he had stated had been entered into, but by letters of the 1st June and 11th June, 1920, he was informed that the contract was unauthorised and invalid and was offered a refund of the deposit of Rs. 1000; and the same repudiation was reiterated on the 1st July, 1920. The Subordinate Judge at Purnea found that the contract was finally repudiated on the 1st June, 1920, and accordingly treating that as the date of breach assessed the damages on the basis of a market price then ruling of Rs. 60 per maund. On appeal, the Judges of the High Court at Patna held that the date of the breach was the 30th April, 1920, by which date the contract, according to its terms, ought to have been completed by full delivery. Their Lordships are of opinion that this was the correct date of breach: there is no evidence that the contract

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time was varied or extended: all that happened was that the appellant wrote pressing for delivery after that date, but the respondent never acknowledged any obligation to deliver, or did anything but repudiate the contract. Their Lordships accordingly pronounce against the appellant's claim that the proper date was either the 1st July, 1920, or the 11th June, 1920, or the 1st June, 1920. On the basis of the date of 30th April, 1920, it is now necessary to consider how the damages are to be estimated. If there was an available market for the goods at the date of breach the damages must be based on the difference between that market price and the contract price: a contract of re-sale becomes immaterial, because if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market, so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. Hence the difference of price, if the market price exceeds the contract price, is the sole damage in general recoverable. The Subordinate Judge had proceeded on the basis of there being an available market, but at the wrong date. The Judges of the High Court on appeal held there was no market price which could be relevant to consider unless there was a market at Purnea, and the Judges accordingly remanded the case to the Subordinate Judge to find what was the market price for Java indigo seed at Purnea or its neighbouring districts on the 30th April, 1920. The Subordinate Judge had evidence before him that dealings in the Purnea district in Java indigo seed were controlled by the market at Cawnpore, but as Cawnpore was 300 or 400 miles away from Purnea, he, following the direction from the High Court, rejected evidence which was tendered by the appellant relative to the market at Cawnpore, and refused to allow proof of the prevailing rate at Cawnpore, the appellant having given evidence that there was no recognised market for the seed at Purnea. He found, however, that the market price at Purnea was Rs. 15 per maund, on evidence led for the respondent of two transactions between the respondent as landlord and certain growers as his tenants. The Judges of the High Court on appeal held that these were special transactions depending on the relationship of the parties and afforded no criterion of a market price. They held that there was no market for the goods at Purnea, and that being so, that the measure of the appellant's damages was the difference between

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the price under the contract sued on, and that under a sub-contract of sale made between the appellant and a merchant at Cawnpore called Varma, dated the 14th November, 1919, on terms similar except as to price to those in the contract sued on, treating that as evidence, in the absence of a market price of the true value of the goods. Their Lordships are of opinion that if it were right to exclude consideration of market prices ruling at Cawnpore, and to hold that there was no relevant market price, still the measure of damage adopted by the Judges of the High Court would not be correct, because what is material is the value of spot goods at the date of the breach, whereas the prices in the two contracts were those ruling in the previous November for future goods deliverable in April, 1920. But in their Lordships' opinion the learned Judges were wrong in excluding evidence of the market prices for indigo seed ruling at Cawnpore. It is clear on the evidence that Cawnpore was the central market for indigo seed, to which growers at Purnea would resort, if need were, to sell and purchasers would resort, if need were, to buy. The merchants dealing in that commodity carry on business there: the Judges of the High Court treat the place of delivery (f.o.r. Purnea) as fixing the locality of the relevant market (if any) as at or near Purnea. In their Lordships' opinion, this is a fallacy: the place of delivery may in this case have relevance to the extent of involving some adjustment of price, but as it seems clear that transactions of sale or purchase f.o.r. Purnea are dealt with at Cawnpore, the damages, in their Lordships' opinion, must be based on the facts of this case on the market price ruling at Cawnpore on the 30th April, 1920, and on that alone. Both Courts have rejected the appellant's further or alternative claim based on an award of damages made against him at the suit of Varma on the contract of the 14th November, 1919.

The difficulty in now fixing this relevant market price arises because the Subordinate Judge, under the direction of the Judges of the High Court, excluded evidence tendered by the appellant to establish what that price was. It was contended on behalf of the respondent that in the event of their Lordships finding as they now do, the case must again be remanded to the Subordinate Judge for a finding of fact. Their Lordships are not prepared to adopt that course. The amount involved in the suit is small and the case has already twice been considered by

the Subordinate Judge and twice by the High Court at Patna. It is true that some further evidence might have been available for this Board, if the Courts had not excluded that evidence: but the respondent cannot complain of that result because the exclusion of the evidence was at the instance of his Counsel. Their Lordships feel that there should be an end of this litigation and that they should arrive at an estimate on the materials before them, which if not the best possible are at least sufficient to enable a finding of the relevant market price, and their Lordships accordingly fix it at Rs. 40 per maund, as against the appellant's claim on the relevant basis of Rs. 50 per maund. Their Lordships are of opinion, therefore, that the appellant is entitled to damages on the basis of Rs. 18 per maund on 200 maunds, and is also entitled to the return of the earnest money Rs. 1000 with interest thereon from the 9th November, 1919, to the date of the Order in Council made on the appeal, at 12 per cent. per annum. The appeal in their Lordships' opinion should thus be allowed and the appellant have his costs of the proceedings in the Courts below, and of this appeal. Their Lordships will humbly advise His Majesty accordingly.

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Solicitors for appellant: *Douglas, Grant and Dold.*

Solicitor for respondents: *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Mauritius.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND LORD MACMILLAN.

Raymond Lincoln .. *Appellant**

v.

Mrs. Alice Poupinel de Valence, the widow of Louis le Breton .. *Respondent.*

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Negligence—Motor accident—Personal injuries—Action for damages—Variance between pleading and proof—Relief on facts proved.

In an action for damages for personal injuries sustained in a motor accident, the burden of proof is on the plaintiff; if he is unsuccessful in proving the case which both in averment and in evidence he sets out to make, he must inevitably fail.

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*P. C. Appeal No. 31 of 1931. 16th February, 1932.

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Nor is the plaintiff entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask the Court of Appeal to find negligence established on a quite different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet.

Appeal No. 31 of 1931 from the decision of the Supreme Court of Mauritius.

Charles Doughty, K.C., T. Mathew and *Gerald Johnstone* for appellant.

H. I. P. Hallett for respondent.

16th February, 1932. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—Their Lordships on this occasion find themselves in the unusual position of being the first Court of Appeal from the trial tribunal. Any disadvantage, however, which might otherwise have arisen from the absence of any intermediate review is compensated by the fact that the Court of first instance was composed of three Judges of the Supreme Court of Mauritius, at whose hands the case has manifestly received prolonged and careful consideration.

The action is one of damages for personal injuries sustained by the plaintiff in a motor accident, such as is commonly tried in this country by a Judge and jury, and resulted in a unanimous judgment for the defendant. Inasmuch as the appeal is not from the verdict of a jury, their Lordships have conceived it to be their duty to review the whole case on its merits and not merely to consider whether there was evidence before the Court below on which the judgment pronounced could proceed. At the same time, in a case such as this, in which the issues are entirely confined to questions of fact and credibility, their Lordships recognise that the Judges in Mauritius, who not only saw and heard the witnesses, but also twice viewed the locus of the accident, possessed advantages in weighing the evidence which are denied to their Lordships.

The accident occurred about 5.30 in the afternoon of the 25th December, 1928, in broad daylight, in the Rue Royale, an important thoroughfare in Port Louis, at a spot close to the entrance to the house and grounds of a Mr. d'Unienville. The road is here on a rising gradient from the direction of L'Eau Coulee towards the Curepipe Road Station, and is about 27½ feet broad, with a ditch on each side, and apparently no regular footpath on either side. The entrance to Mr. d'Unienville's

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house and grounds is by a drive leading off at right angles from the road on the left side as it ascends, and the ditch is at this point covered over in order to give access for foot passengers and vehicles to his premises. The church of Ste. Helene is on the same side of the road as Mr. d'Unienville's property, about fifty or sixty yards away in the downhill direction.

On the occasion of the accident the plaintiff was proceeding up the road on a motor-bicycle towards Curepipe Road Station on his own, the left-hand, side of the road. The defendant's motor-car was being driven by the defendant's chauffeur, who was its sole occupant, in the opposite direction and was on its way to Mr. d'Unienville's house.

The plaintiff alleges that the defendant's chauffeur so negligently managed and drove his motor-car that it collided with the plaintiff's motor-bicycle, with the result that the plaintiff and his motor-bicycle were thrown into the ditch and the plaintiff so seriously injured that his right leg had to be amputated. He avers in his statement of claim that "the negligence of the defendant's chauffeur consisted in driving the said motor-car at a speed and in a manner dangerous to the public, having regard to the nature, condition and use of the highway, and in turning the said motor-car without warning and suddenly across the said highway towards the entrance to the drive of an adjoining house, when the said motor-car collided with the said motor-cycle." The defendant denies that the accident was due to the negligence of her chauffeur and avers that the collision was the direct result of the plaintiff's reckless driving of his motor-cycle at an excessive speed, that her chauffeur did all he could to avoid the accident, and that the plaintiff was alone to blame.

The plaintiff gave evidence which conformed generally with the allegations in his statement of claim. He said that he was proceeding up the Rue Royale at a normal speed on the extreme left of the roadway and was near the church of Ste. Helene when he observed the defendant's motor-car approaching from the opposite direction. It was then abreast of the entrance to Mr. d'Unienville's house. As he had, he said, a perfectly clear course in front of him he continued on his way till he had got almost past Mr. d'Unienville's entrance, when the defendant's motor-car turned "*brusquement et rapidement*" across the road, with the result that the plaintiff's motor-cycle collided

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with it about four feet from the ditch. Up to the moment when the motor-car suddenly turned upon him he had no warning and saw no indication that it was going to cross over to Mr. d'Unienville's entrance. When he saw it, it was parallel with the direction of the road, and if it had started across the road before he came up he would have noticed it. If he had seen it slanting across to enter Mr. d'Unienville's drive he could probably have passed behind it if it had not suddenly turned upon him. The plaintiff is not able to say whether before the collision the motor-car had stopped on the other side of the road before turning across. It may be added that the plaintiff in his evidence made a point of the clearness and accuracy of his recollection of the events immediately preceding the collision. He had also, as the Acting Chief Judge Nairac points out, the unusual advantage, owing to the course which the proceedings took, of being afforded an opportunity of adding to or correcting his evidence after it was first given.

Such being the account of the facts put forward by the plaintiff in the Court below and adhered to by him in his printed case to this Board, it is manifest that were it accepted he would be well on the way to establishing his claim. Unfortunately for him, the Judges in Mauritius unanimously rejected his story, and when the appeal was opened at their Lordships' bar the plaintiff's Counsel candidly admitted that he could not rely on his client's account of the matter. This circumstance of itself would in the ordinary case be enough to justify the dismissal of the appeal, for, the burden of proof being upon the plaintiff, if he is unsuccessful in proving the case which both in averment and in evidence he sets out to make, he must inevitably fail. Mr. Doughty, however, submitted on his client's behalf that, accepting in almost all material respects the very different account of the facts which the Judges below found proved and praying in aid portions of the evidence of the defendant's chauffeur, he was still entitled to succeed, as on this different presentment of the facts he was still able to show that the defendant's chauffeur had been guilty of negligence. Their Lordships heard Counsel's argument in full, but they must observe that they cannot lend any countenance to the view that a plaintiff is entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask their Lordships to find negligence established on a quite

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different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet. This is illustrated in the present instance by the fact that neither in the evidence nor in the judgments below was attention directed to the elucidation of the case as now presented at their Lordships' bar, and matters are left uncertain which would doubtless have been cleared up had the case now sought to be made been advanced below. It is true that the story told by the defendant's chauffeur also failed to find acceptance at the hands of the Judges, and their Lordships had the remarkable experience of hearing Counsel on each side declining to rely upon the testimony of his leading witness. But the circumstance that the evidence of the two participants in the accident, the plaintiff and the defendant's chauffeur, has not been accepted by the Judges who heard the case, and is not put forward by either side before their Lordships as reliable, certainly does not advance the appellant's case or entitle him to avail himself of coincidences in their inaccuracies.

Fortunately, in the interests of truth, the Court in Mauritius had the advantage of hearing the testimony of two independent eye-witnesses of the accident, whose evidence the Court accepted and whose account of the matter their Lordships are satisfied is accurate.

One of these witnesses is Mr. Houdet, who with his wife and two daughters was on his way up the road from the church. He says that a little before he reached Mr. d'Unienville's entrance he saw a motor-car coming in the opposite direction and heard the chauffeur sound his horn and saw him make a signal by holding out his arm. As he saw that the car was about to enter Mr. d'Unienville's drive he and his family stopped, and the chauffeur observing them brought his car to a stand to allow them to pass. "I am certain," he says, "that when I crossed Mr. d'Unienville's entrance the car had already slanted across and had stopped in an oblique position relatively to Mr. d'Unienville's entrance. The distance between the outer edge of the culvert at Mr. d'Unienville's and the place where the car was standing was about five to seven feet; the distance could not have been more as we had to pass in Indian file."

The other independent eye-witness was Mr. Le Meme, who at the time of the accident was walking up the road on the

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opposite side; that is, on the side on which the defendant's car approached. His evidence is not so precise as that of Mr. Houdet, but he speaks to seeing the defendant's motor-car turning slowly to its right to enter Mr. d'Unienville's drive before the accident occurred. He is not sure, but is "under the impression that the car had practically stopped to let some people go by." "The car," he says, "looked stationary at the moment when it was making the curve; it was going so slowly that I thought it had stopped." The only other witness who actually saw the accident was a cake-seller, Dawood Bheekhoo, who was coming down the road on Mr. d'Unienville's side, and who stopped, on a signal from the defendant's chauffeur, to let the car enter the drive, but as he is characterised by one of the Judges as a "downright liar" and no one believes him, his contribution may be disregarded.

It will have been observed that in Mr. Houdet's testimony there is an item of what may be termed real evidence, namely, that he and his family had to fall into Indian file in order to pass between the defendant's car and the edge of the culvert covering the ditch at Mr. d'Unienville's entrance. The plaintiff himself seems to admit that the Houdets passed in single file in front of the car, for, when asked if he did not think that they and two other persons occupied a space of four feet from the ditch, his answer was, "Non. Il me semble que ces personnes etaient a la file indienne, l'une derriere l'autre; je n'ai pas vu que ces personnes occupaient la largeur du chemin." Now the fact that the Houdet family had to go in Indian file in order to pass between the defendant's car and the side of the road is conclusive of two things: first, that the car must have been, as Mr. Houdet said, stationary at the time, and, second, that the front of the car must have been only a short distance from the edge of the road.

Accepting the fact, contrary to the appellant's evidence, that the car had pulled up on the slant at a distance of from five to seven feet from the ditch to allow the Houdets to pass, and admitting that up to this point there was no negligence on the part of the defendant's chauffeur, the appellant's Counsel submitted that it was negligent on the part of the defendant's chauffeur to set his car in motion after the Houdets had passed and to proceed towards Mr. d'Unienville's drive without looking round to see if any other traffic was coming up on his left

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between him and the ditch; if he had looked, it was urged, he must have seen the plaintiff approaching and about to pass through the space between the car and the culvert. But it is not proved that the defendant's chauffeur did in fact restart before the collision. On this point the appellant's Counsel sought to avail himself of the evidence of the defendant's chauffeur, but the appellant cannot legitimately invoke for this purpose evidence directed to another and quite different story which has not been believed. This belated attempt to establish a new ground of negligence against the defendant's chauffeur on the reconstituted facts as found by the Court below and accepted by their Lordships demonstrates the danger of allowing a new case to be put forward at this late stage, for what is now sought to be made the crisis of the case is a point to which neither the evidence nor the attention of the Judges below was directed. Their Lordships are in consequence unable to ascertain whether or not the Judges below were of opinion that the defendant's car was restarted after the Houdets passed in front of it, while the evidence on the subject is left quite inconclusive. In such a state of matters it would be out of the question for their Lordships to find that negligence on the part of the defendant's chauffeur had been proved.

As the plaintiff's evidence was that his side of the road was clear ahead and that the defendant's car was on the other side of the road until it suddenly turned in upon him, he has, of course, given no explanation of how he did not see the defendant's car standing at rest aslant across the road, and of why he came on in these circumstances without slackening his speed —which was certainly not less than 15 miles an hour, and may well have been more, for after the collision his cycle went on for some 42 feet before it collapsed into the ditch, incidentally striking Mr. Houdet and the cake-seller on its way. The plaintiff himself says that if he had seen the car in such a position as that in which it is now found to have been he could have passed behind it. If it is necessary to reach any conclusion as to what really happened, it is most probable either that the plaintiff never observed the car standing athwart the road at all or if he did that he thought he could pass between the standing car and the culvert, and by an unhappy miscalculation just hit the side of the defendant's car.

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As their Lordships have indicated, the complete failure of the appellant to establish the case of negligence averred in his pleadings and spoken to in his evidence would have justified the dismissal of the appeal on this ground alone, but their Lordships, recognising the seriousness of the matter to the appellant, have re-examined the whole case on its merits and, having done so, they find themselves in complete agreement with the result reached by the Court below.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. The defendant will have her costs of the appeal.

Solicitors for appellant: *Ranger, Burton and Frost.*

Solicitors for respondent: *White & Co.*

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE CORNISH.

Kumaraswami Mudali, minor, by next friend Ganapathi Mudali.. *Petitioner in both* (Plaintiff)*

v.

Muniratna Mudali .. *Respondent in C. R. P. No. 608 of 1927*

The Board of Revenue, Madras and another .. *Respondents in C. M. P. No. 3228 of 1927 (Defendants).*

Kumaraswami Mudali v. Muniratna Mudali.

Certiorari—When issued—Board of Revenue—Second appeal—Order made without hearing party—Jurisdiction—Madras Hereditary Village Offices Act (III of 1895), S. 23—Rules framed under S. 20—Standing Order No. 172, paragraph 11, rule 16—Government of India Act (5 and 6 Geo. V, c. 61), S. 107—"Subordinate Court"—Board of Revenue, not a.

A writ of *certiorari* will only issue where it is shown that the Court, whose order it is sought to be made the subject of the writ, has acted either without jurisdiction or in excess of it. And it is only discretionary.

It is only in cases of reference of questions of law to the Board of Revenue that it is bound, on the request of the parties, to hear them. This is made clear by R. 16 framed under Standing Order No. 172 read with S. 18 of Act III of 1895. In a second appeal to the Board under S. 23 of the Act, the Board has jurisdiction to make an order in the absence of the party.

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* C. R. P. No. 608 of 1927 and C. M. P. No. 3228 of 1927.

7th March, 1932.

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The High Court has no power to take cognizance of a claim to any of the offices specified in S. 3 of the Act (*vide* S. 21), and the Board of Revenue, when deciding such a claim, does not stand in the place of a subordinate Court and is not subject to the revisional jurisdiction of the High Court.

Chinnayya Gounder, In re, (1921) 41 M. L. J. 577, followed.

C. R. P. No. 608 of 1927.—Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Board of Revenue, Madras, dated the 30th March, 1927 and made in Mis. Case No. 863 of 1927 (Suit Appeal No. 2 of 1926 on the file of the Court of the District Collector of North Arcot—Revenue Suit No. 1 of 1925 on the file of the Court of the Deputy Collector of Ranipet).

C. M. P. No. 3228 of 1927.—Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 1703 of 1927 and in the Memorandum of Grounds in C. R. P. No. 608 of 1927 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* to bring in and quash and set aside the judgment and proceedings of the Board of Revenue, Madras, in Mis. Case No. 863 of 1927, dated 30th March, 1927.

L. A. Govindaraghava Aiyar and *P. S. Ramachandra Aiyar* for petitioner.

C. S. Venkatachariar and *T. K. Srinivasa Thathachariar* for respondent.

The Government Pleader (*P. Venkataramana Rao*) on behalf of the Government.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—This is an application for the issue of a writ of *certiorari*. There is also a Civil Revision Petition. Both arise out of an order made by the Board of Revenue in a second appeal to it under S. 23 of the Madras Hereditary Village Offices Act. The petitioner in a suit before the Revenue Divisional Officer got himself registered as a village officer. An appeal under the Act was taken to the District Collector who confirmed the Revenue Divisional Officer's order and there was a second appeal to the Board of Revenue. The Board of Revenue allowed the appeal. The petitioner argues that he is entitled to a writ of *certiorari* or to have the order of the Revenue Board revised here on a Civil Revision Petition. A preliminary objection is taken both to the petition for a writ of *certiorari* and the Civil Revision Petition. With regard to

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the issue of a writ of *certiorari*, it has been laid down by this Court, following the decisions of the English Courts, that a writ of *certiorari* will only issue where it is shown that the Court, whose order is sought to be made the subject of the writ, has acted either without jurisdiction or in excess of it. It is clear also that, even if either of these essentials is present, the issue of the writ is purely discretionary in the High Court. We have got to consider here, first of all, what is the want of jurisdiction or excess of it alleged by the petitioner. It is stated—and it is a fact—that the Board of Revenue came to a decision and made its order in the second appeal without hearing the petitioner. It is said that, in doing so, the Board acted in excess of its jurisdiction. This contention has to be examined in the light of the Act itself and of the rules made both under the Act and in consequence of the Act. By S. 23 of the Act, in such cases as the present, an appeal is given from the District Collector to the Board of Revenue. Certain rules are made by the Board of Revenue with the approval of Government under S. 20 of the Act and amongst others are rules for the holding of enquiries under Ss. 6, 7 and 8 and the hearing of appeals under S. 23. It is with the hearing of the appeal under S. 23 that we are concerned here. Those rules commence at No. 11 and provide for the service of notice upon the parties to the suit and the appeal and also for the hearing of the parties on an appeal to the District Collector. Although the rules proceed to lay down the procedure to be adopted on second appeal to the Board of Revenue, they are silent with regard to the hearing of the parties to the appeal. Hence it is argued on behalf of the Board that, whilst the rules provide for the hearing of the parties both in the suit stage of the case and in its first appellate stage, when it reaches the stage of a second appeal, that provision is expressly omitted. The matter is, however, made more certain by rule 16, (under Standing Order No. 172, paragraph 11), which is not a rule made under S. 20 of the Act. That is as follows:—

"The Board will not hear either petitioners or their counsel in person except as provided by S. 18 (2) of Madras Act III of 1895 or by Ss. 190 and 205 of Madras Act I of 1908."

Section 18 (1) deals with the reference in certain cases of questions of law by the Collector to the Board of Revenue; and sub-section (2) of the same section provides the procedure and states that the Board of Revenue shall, if any of the parties so

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request, hear him or his agent and shall decide the point referred. Here there is in the Act an express provision for the hearing of the parties when the case is considered by the Board of Revenue on a reference and it seems to me that this shows that an exception is made to the case which comes up to the Board on second appeal. In my view it is only in cases of reference of points of law to the Board of Revenue that it is bound, on the request of the parties, to hear them. It is, however, argued on behalf of the petitioner that Rule 16 is *ultra vires* because it goes beyond anything in the Act and it is contrary to law and justice that, in the absence of a party, his rights should be injuriously affected. For the reasons which I have already stated, I am of the opinion that Rule 16 is certainly not inconsistent with the sections dealing with this matter in the Act. It seems to me that S. 18 by expressly providing for parties' counsel to be heard in cases of reference makes the procedure not allowing the parties to be heard on second appeals to the Board of Revenue quite consistent. It is, therefore, clear that the Board of Revenue in making its order in the absence of the petitioner was not acting in excess of its jurisdiction. That being so, this is certainly not a case for the issue of a writ of *certiorari*. Upon this point there is a case in this High Court, viz., a decision of Ayling, Offg. C. J., and Odgers, J. in In re *Chinnayya Gounder*.[1] The case deals with the question of the right of the High Court to interfere with the orders of the Board of Revenue made under the Hereditary Village Offices Act, under either S. 115 of the Code of Civil Procedure or S. 107 of the Government of India Act. Dealing with S. 107 of the Government of India Act, Ayling, Offg. C. J., says:

" Appellate jurisdiction no doubt includes the power to interfere in revision and is not confined to cases in which the law allows a regular appeal. As stated by Subramania Aiyar, J., in *Chappan* v *Moidin Kutti*,[2] the two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior court and the power on the part of the former to review the decisions of the latter. I accept this definition but I cannot see here either the relation or the power. It cannot be assumed that every officer exercising statutory powers in this Presidency stands to this Court in the relation of an inferior court to a superior or that we have the power to review his decisions. Madras Act III of 1895 is a self-contained Act which, as set out in its preamble, purports to provide, for the succession to certain hereditary village offices in the Presidency of Madras; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to hold such offices and the control of the holders thereof; and for certain other purposes' ."

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1. (1921) 41 M.L.J. 577. 2. (1897) I.L.R. 22 Mad 68: 8 M.L.J. 231 (F.B.).

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It is difficult to say how in such a case as this it can be argued that a Revenue Court is a Court which stands in relation to the High Court as an inferior court to a superior court, when reference is made to S. 21 of the Act which says:

"No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office . . ."

This is one of the offices specified in S. 3 and, if a Civil Revision Petition lies, then the High Court will be taking into consideration a claim to one of the offices specified in that section. That is expressly barred by S. 21 of the Act. However, it is argued that, the Act being a purely local one, it cannot by its legislation take away the powers which the High Court possesses under its Charter. It is quite true that a local Act cannot take away any of the powers which the High Court possesses but it is perfectly clear that the High Court never did possess the power of interference in such matters as this. That also is pointed out in In re *Chinnayya Gounder*[1] already referred to. At page 580, Ayling, Offg. C. J., says:

"It has been suggested that if this be so, Act III of 1895 purported to take away powers which the High Court possessed prior to its enactment and to that extent is *ultra vires*; but I can discover no basis for this. Prior to its enactment the position of hereditary village officers was governed by Regulation VI of 1831; and this Regulation is, if possible, even more explicit than the Act now in force in placing such village officers as the petitioner under the exclusive control of the Revenue authorities."

The preamble to that regulation is as follows:—

" And whereas effectually to prevent the appropriation of such emoluments to purposes other than those for which they were originally designed, it is requisite to declare that all such emoluments are inalienable by mortgage, sale, gift or otherwise; to provide that no claim to such offices, or to any of the emoluments annexed thereto, shall be cognizable by the ordinary courts of judicature."

That, in my view, makes it perfectly clear that the High Court never did have any power of interference with the Revenue Courts in such matters as this. For these reasons, the petition for the issue of a writ of *certiorari* and the Civil Revision Petition must be dismissed with costs (two sets).

Cornish, J.

Cornish, J.—I am of the same opinion. The question is, whether the Board, which clearly had jurisdiction to decide the appeal, had jurisdiction to decide it without giving the petitioner an opportunity of being heard. The answer to that question depends upon whether Rule 16 of Standing Order

1. (1921) 41 M. L. J. 577.

172 of the Board of Revenue (paragraph 11) is *ultra vires*. That rule is not described as a rule made under S. 20 (2) of the Act, but it is obviously made with reference to the Act and to the powers given by S. 20, and must, I think, be taken to be a rule made in regard to the hearing of appeals under S. 23. S. 20 requires that the rule so made shall not be inconsistent with the provisions of the Act. The test, then, whether this rule is *ultra vires* is whether it is inconsistent with anything provided in the Act. It is only necessary to look at S. 18 of the Act, which is the one section in the Act expressly providing for the procedure in matters coming before the Board, to see how completely consistent with it the rule is. S. 18 (2) makes a special provision for allowing the parties or their agents to be heard on a reference to the Board of a point of law under S. 18 (1) if any of the parties so request. In my view, it is quite consistent that the right of being heard in person or by counsel should be limited by rule to the only occasion on which this right is given by the Act.

Kumaraswami Mudali *v.* Muniratna Mudali.

Cornish, J.

With regard to the Civil Revision Petition which has been argued before us, in my judgment, the jurisdiction of the High Court to revise the decision of the Board on the petitioner's claim is expressly excluded by S. 21 of the Act. This is not a case of a Provincial Act purporting to take away from the High Court a right to supervise courts of inferior jurisdiction, for, as was held in In re *Chinnayya Gounder*[1] the power of control given to Collectors over village officers was never subject to the High Court's superintendence. I agree that both the petitions should be dismissed.

S. R. —— *Petitions dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Dulahin Jadunath Kuar .. *Appellant**

v.

Raja Bisheshar Bakhsh Singh .. *Respondent.*

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Oudh Estates Act (I of 1869, as amended by United Provinces Act III of 1910), Ss. 19, 22, sub-section (10)—Validity of unattested wills executed

* P. C. Appeals Nos. 102, 103 and 104 of 1929. 4th December, 1930 and 8th March, 1932.

Oudh Appeals Nos. 38 of 1927 and 2 and 9 of 1928.

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after passing of the 1869 Act but before publication of the lists under Ss. 8 *and* 9—"*Male agnate*"—*Meaning of—Hindu Law—Succession*—Gotraja-sapinda—*Fulfilment of both conditions essential.*

The provisions of S. 19 of the Oudh Estates Act, 1869, requiring (*inter alia*) that the will of a taluqdar, to be valid, must be duly attested in accordance with S 50 of the Indian Succession Act, 1865, apply to every will executed *after the passing of the* 1869 *Act* (viz., the 12th January, 1869), irrespective of the date when the list of taluqdars was prepared and approved under Ss. 8 and 9 of the Act.

In ascertaining the meaning of the words "male agnate" in S. 22, subsection (10) of the Oudh Estates Act, I of 1869, as amended by the United Provinces Act, III of 1910, recourse must necessarily be had to the personal law of the individual to whom the succession is to be established. Where, for instance, the parties are Hindus governed by the Mitakshara School, "male agnate" denotes a *gotraja-sapinda*, and a plaintiff, in order to qualify as a male agnate, must satisfy two conditions, viz., (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males. The plaintiff must satisfy the Court of the fulfilment of both these conditions, and it is not sufficient for him to prove merely that he was a *sapinda* of the propositus. He must further establish the identity of his *gotra* with that of the propositus.

Raghuraj Chandra v *Subhadra Kunwar*, (1928) L. R. 55 I. A. 139: I.L.R. 3 Luck. 76: 55 M.L.J. 778 (P.C.); *Bhyah Ram Singh* v. *Bhyah Ugar Singh*, (1870) 13 Moo. I. A. 373; *Lallubhai* v. *Cassibai*, (1880) L. R. 7 I. A. 212: I. L. R. 5 B. 110 (P. C.) and *Ramchandra Martand* v. *Vinayak*, (1914) L. R. 41 I. A. 290: I. L. R. 42 C. 384: 27 M. L. J. 333 (P. C.), referred to.

Judgment of the Chief Court of Oudh (I. L. R. 3 Luck. 326) varied.

Consolidated appeals Nos. 102, 103 and 104, from a judgment and decrees, dated the 15th December, 1927, of the Chief Court of Oudh (Stuart, C. J. and Wazir Hasan, J.), which varied a judgment and decree, dated the 4th January, 1927, of Mr. Justice King, sitting on the Original Side.

The facts of the case are fully set out in their Lordships' two judgments delivered on the 4th December, 1930 and 8th March, 1932, and in the judgment of Stuart, C.J. and Wazir Hasan, J., in the Court below, reported in I. L. R. 3 Luck. 326.

Beside those referred to in the judgment, the following authorities were cited during the arguments in Appeals Nos. 102 and 103, which were heard in October, 1930:—

Hurpurshad v. *Sheo Dyal*,[1] *Rajah Rameshar Baksh Singh* v. *Arjun Singh*,[2] *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*,[3] *Khunni Lal* v. *Gobind Krishna Narain*,[4] *Ramsumran Prasad* v. *Shyam Kumari*,[5] *Achal Ram* v. *Udai Partab*,[6] *Narindar Bahadur Singh* v.

1. (1876) L.R. 3 I. A. 259. 2. (1900) L.R. 28 I.A. 1: I.L.R. 23 A. 194 (P.C.).
3. (1874) L. R. 1 I. A. 157.
4. (1911) L. R. 38 I. A. 87: I. L. R. 33 A. 356: 21 M. L. J. 645 (P. C.).
5. (1922) L. R. 49 I. A. 342: I. L. R. 1 Pat. 741: 44 M. L. J. 751 (P.C.).
6. (1883) L. R. 11 I. A. 51: I. L. R. 10 C. 511 (P. C.).

Achal Ram,[7] *Bal Gangadhar Tilak* v. *Shriniwas Pandit*,[8] *Chaudhri Satgur Prashad* v. *Kishore Lal*,[9] *Thakur Sheo Singh* v *Rani Raghubans Kunwar*,[10] *Mohammad Abdussamad* v. *Kurban Husain*,[11] *Thakurain Balraj Kunwar* v *Rae Jagatpal Singh*,[12] *Rup Narain* v. *Mt. Gopal Devi*[13] and *Mata Prasad* v. *Nageshar Sahai*.[14]

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During the course of the arguments in Appeal No. 104, which was reheard before a larger Board in January, 1932, reference was made also to *Rutcheputty Dutt Iha, Bholaunauth Iha* v. *Rajunder Narain Rae and Coowar Mohainder Narain Rae*,[15] *Ramchandra* v. *Gopal*[16] and *Debi Pershad Chowdhry* v. *Rani Radha Chowdhrain*.[17]

Sir John Simon, K. C., De Gruyther, K. C., Dunne, K. C. and *Dube, K. C.*, for defendant No. 1, Dulahin Jadunath Kuar, in Appeals Nos. 102 and 103.

Upjohn, K. C., Wallach and *A. P. Sen* for plaintiff, Raja Bisheshar Bakhsh Singh, in Appeals Nos. 102 and 103.

Dunne, K. C. and *Parikh* for defendant No. 2, Lal Pratap Harihar Bakhsh Singh, in Appeal No. 104.

Upjohn, K. C., De Gruyther, K. C. and *Wallach* for plaintiff, in Appeal No. 104.

4th December, 1930. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—These are three consolidated appeals from two decrees, dated the 15th December, 1927, passed by the Chief Court of Oudh, which varied a decree, dated the 4th January, 1927, of a single Judge of the same Court sitting as a Court of Original Civil Jurisdiction.

The plaintiff in the suit out of which these appeals have arisen was Raja Bisheshar Bakhsh Singh, and he is appellant in the second of these appeals (No. 103 of 1929). The defendants in the suit were (1) Dulahin Jadunath Kuar (hereinafter referred to as defendant No. 1), who is appellant in the first appeal (No. 102 of 1929), (2) Lal Pratap Harihar Bakhsh Singh (hereinafter referred to as defendant No. 2), who is

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7. (1893) L. R. 20 I. A 77: I. L R. 20 C. 649 (P C.).
8. (1915) L. R. 42 I. A. 135: I. L. R. 39 B. 441: 29 M. L. J. 34 (P. C.).
9. (1919) L. R. 46 I. A. 197: I. L. R 42 A. 152: 38 M. L. J 259 (P. C.).
10. (1905) L. R. 32 I. A. 203: I. L. R. 27 A. 634 : 15 M. L. J 352 (P. C.).
11. (1903) L R. 31 I. A. 30: I. L. R 26 A. 119 (P. C.)
12. (1904) L. R. 31 I. A. 132: I. L. R. 26 A. 393 (P. C.).
13. (1909) L R 36 I. A 103: I. L. R. 36 C. 780: 19 M. L. J. 548 (P. C.).
14. (1925) L. R. 52 I. A. 398: I. L. R. 47 A. 883: 50 M. L. J. 18 (P. C.).
15 (1839) 2 Moo. I. A 132. 16 (1908) I L. R. 32 Bom. 619.
17. (1904) L. R. 31 I. A. 160: I. L. R. 32 Cal. 84 (P. C.).

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appellant in the third appeal (No. 104 of 1929), and (3) Mahabir Singh. The last-named is not a party to the first two appeals, as, by agreement with the plaintiff, the appeal which he had taken from the decree of the Trial Judge to the Chief Court was dismissed on the 15th of March, 1927.

In the suit the plaintiff claims possession of the Taluka Gangwal, consisting of sixty villages as set out in the schedule attached to the plaint, lying in District Bahraich and District Gonda, as the nearest male agnate according to the rule of lineal primogeniture, of Raja Suraj Pragash Singh, the last male holder, who died in 1899, in terms of S. 22 (10) of the Oudh Estates Act, 1869, as amended by the Oudh Estates (Amendment) Act, 1910. In the suit the plaintiff also claimed certain other property, as to which no question arises in these appeals.

Two main questions arise in the present appeals, viz. :— (*a*) Whether the succession is governed by the provisions of the Oudh Estates Act, which arises in the first appeal, and, if so, (*b*) whether the plaintiff is "the nearest male agnate according to the rule of lineal primogeniture" within the meaning of the Act, which arises in the third appeal.

A minor question is raised in the second appeal as to certain villages, which the Chief Court held defendant No. 1 entitled to hold during her life, thereby varying the decree of the Trial Judge.

Raja Sitla Bakhsh Singh was the first *Talukdar* of Gangwal, and his name was entered in Lists I and II, prepared in accordance with the provisions of S. 8 of the Act of 1869. The Act was passed on the 12th January, 1869, and in terms of S. 9 these lists were approved by the Chief Commissioner of Oudh on the 20th July, 1869, and published in the *Gazette of India* on the 31st July, 1869.

On the 3rd April, 1869, Raja Sitla wrote a letter to the Deputy Commissioner of Bahraich, in which he said: "I beg to state that, firstly, I hope to have issues, and they will, after me, succeed me. In case there be no hope of issue, the two legally-wedded Ranis of mine are (*malik*) proprietors (of my estate). After my death, the Rani Saheba have power. Share in the estate shall not be divided." It was not disputed before this Board that, as concurrently found by both Courts below, this document is of a testamentary nature. It was equally

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undisputed that this document was not attested as required by S. 19, which incorporated S. 50 of the Indian Succession Act, but the application of S. 19 was disputed. If this document was both valid and operative as a will, it was not disputed that its effect was to take the succession outside the operation of the Act, with the consequent failure of the plaintiff's case.

The defendants stand on the defensive and put the plaintiff to proof of his title to claim the estate.

The question of the validity of the will depends on construction of the original Act of 1869, apart from its amendment by the Act of 1910. Both the Courts below have held that the will was invalid on the ground that it was not attested as required by S. 19 of the Act of 1869, the material part of which is as follows:—

" 19. Sections 49, 50, 51, 54, 55, and 57 to 77 (both inclusive), and Ss. 82, 83, 85, and 88 to 98 (both inclusive), of the Indian Succession Act (No. X of 1865), shall apply to all wills and codicils made by any *Talukdar* or Grantee, or by his heir or legatee, under the provisions of this Act, for the purpose of bequeathing to any person his estate, or any portion thereof, or any interest therein: Provided that marriage shall not revoke any such will or codicil: Provided also that nothing herein contained shall affect wills made before the passing of this Act. . . ."

Defendant No. 1, who is appellant in this issue, maintains that the provisions of S. 19 of the Act of 1869 with regard to the attestation of wills made by *talukdars* did not apply to a will made before approval and publication under S. 9 of the lists prepared under S. 8, even though, as in the present case, at the time of his making the will, the *talukdar's* name was included in the lists made up for the purpose of subsequent approval and publication. This contention is based on the definition of *talukdar* in S. 2, which is as follows:—

" *Talukdar* means any person whose name is entered in the first of the lists mentioned in section eight."

The material portion of S. 8 is as follows:—

"8. Within six months after the passing of this Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India in Council, shall cause to be prepared six lists, namely:—

"*First.*—A list of all persons who are to be considered *Talukdars* within the meaning of this Act. . . ."

Sections 9 and 10 may also be conveniently cited here:—

"9. When the lists mentioned in section eight shall have been approved by the Chief Commissioner of Oudh, they shall be published in the *Gazette of India*. After such publication, the first and second of the said lists shall not, except in the manner provided by section thirty or section thirty-one, as

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the case may be, be liable to any alteration in respect of the names entered therein. If, at any time after the publication of the said lists, it appears to the Governor-General of India in Council that the name of any person has been wrongly omitted from or wrongly entered in any of the said lists, the said Governor in Council may order the name to be inserted in the proper list, and such name shall be published in the *Gazette of India* in a supplementary list, and such person shall be treated in all respects as if his name had been from the first inserted in the proper list.

"10. No persons shall be considered *Talukdars* or Grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such *Talukdars* or Grantees."

Defendant No. 1 maintained that there could not be a list within the meaning of the definition until at least the approval of the Chief Commissioner had been obtained, that the reference to lists in the definition was imperative and not merely evidentiary, and that the definition applied to S. 19 as fully as to any other section. The plaintiff, on the other hand, maintained that the reference to lists in the definition was merely evidentiary and that the Act applied, as from its passing, to every *talukdar* who came within the terms of S. 3, which, apart from the definition, appears to be declaratory of the rights of an existing class. He further maintained that, even if the definition is imperative, it was repugnant to the context of S. 19 and in particular to the proviso as to wills made before the passing of the Act. The plaintiff did not maintain that the provisions of S. 13 as to registration applied in the present case, as he was unable to say that the legatee was not a person excepted from the operation of the section.

The history of events from the annexation of Oudh in 1856 up to the passing of the Oudh Estates Act in 1869, including the Summary Settlement, the preparation of lists of *talukdars* and the granting of *sanads* to *talukdars* was fully dealt with before their Lordships, and the plaintiff founded on the two orders of the Governor-General incorporated in the first schedule to the Act, but their Lordships are of opinion that the Act only recognised a statutory class of *talukdars* and that this is made clear by the provision of S. 10 that no persons should be considered *talukdars* "within the meaning of this Act" other than the persons named in the original and supplementary lists. Further, their Lordships are of opinion that such lists, in the case of the original lists, did not become operative as lists until they had been approved by the Chief Commissioner, but that

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they became operative as from the date of such approval, the subsequent publication being merely public notification of the fact.

The plaintiff founded on certain passages in the judgment of this Board, delivered by Mr. Ameer Ali, in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[1]. In that case the original *talukdar*, whose name appeared in lists 1 and 2 prepared under S. 8, had died in 1865, prior to the passing of the Act, and the property in dispute was not part of the *talukdari* estate under the Act, it being undisputed that the *taluka* fell under the provisions of the Act. It was held that, upon the death in 1899 of a subsequent *talukdar*, the succession to his property, not forming part of his *talukdari* estate, was subject to a rebuttable presumption that there was a family custom of descent to a single heir. In referring to the original *talukdar*, Mr. Ameer Ali said (at p. 276):

"As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on January 22, 1859, a *taluqdari sanad* was granted to him on October 17, 1861, and his name was entered as a *taluqdar* in the first of the lists. He had acquired, as declared by S. 3, 'a permanent, heritable, and transferable right' in his estate, and was unquestionably a *taluqdar* within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to 'cause to be prepared' were obviously in course of preparation long before the passing of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such *taluqdars*."

No argument arose in that case as to whether the deceased *talukdar* became a *talukdar* within the meaning of the Act as soon as it passed or only on approval of the lists, and, in their Lordships' opinion, either view is consistent with the general expressions used in this passage.

As regards S. 19, their Lordships consider that operative effect should be given, if a reasonable construction so permits, to every provision of a statute, and that to apply the definition of *talukdar* to S. 19 so as to limit its operation to wills made after the approval of the lists would have the effect of rendering the proviso as to wills made before the passing of the Act purposeless; they are therefore of opinion that the definition is to that extent repugnant to the context and is inapplicable. It follows that, in their Lordships' opinion, the provisions of

1. (1916) L.R. 43 I.A. 269 at 276: I.L.R. 38 A. 552: 31 M.L.J. 804 (P.C.).

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S. 19 applied to wills made after the passing of the Act by *talukdars* of the statutory class prescribed by S. 10, and that it applied to the will here in question, so that, being unattested as required by S. 50 of the Indian Succession Act, 1865, it was invalid as a will.

It therefore becomes unnecessary to consider whether, on the assumption that it was a valid will, it ever became operative or was abandoned by the legatee, Raja Sitla's widow, as to which a separate argument was raised.

With regard to the plaintiff's pedigree, there are concurrent findings of fact by the Courts below to the effect that the plaintiff has proved his pedigree, and their Lordships see no reason for disturbing these findings, which establish that, in blood relationship, the plaintiff is the nearest male blood relation according to the rule of lineal primogeniture of the last male holder of the *taluk*. But this leaves open the issue in the third appeal, in which defendant No. 2 raises a point of law on the construction of S. 22 (10) of the 1869 Act as amended by the Act of 1910.

In the first appeal defendant No. 1 also sought to raise a question as to whether a village called Rajapur Grant was comprised in the *taluka*, though no such point was raised in her case of appeal, but, even if it were not too late to raise the point, their Lordships were not prepared to disturb the concurrent findings of fact by the Courts below that the *taluka* consisted of the sixty villages claimed in the plaint, including the village of Rajapur Grant.

In the second appeal (No. 103 of 1929) the plaintiff takes objection to the variation of the decree of the Trial Judge made by the Chief Court, in that they held that defendant No. 1 was entitled to remain in possession during her life of five villages of which she was in possession under an agreement, dated the 29th June, 1899.

Raja Sitla, the original *talukdar*, died in 1885, leaving surviving him his widow, Rani Sukhraj Kuar, and his half-brother, Narpat Singh. Under a compromise of a suit raised by the latter against the former, Narpat Singh was declared to be the absolute owner of the entire estate of Gangwal, and the Rani was allowed to remain in possession of five villages by way of *gusara*, besides some other property, which is not in

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issue in these appeals. Narpat remained in possession of the *taluka* of Gangwal until his death in 1892, when he was succeeded by his son, Raja Suraj Prakash Singh, who died in 1899, having been predeceased by his only son, Mahesh Bakhsh Singh. Raja Suraj Prakash Singh was survived by—

(*a*) Rani Sukraj Kuar, Raja Sitla's widow, who died in 1922;

(*b*) Rani Itraj Kuar, the senior widow of Raja Suraj Prakash Singh, who died in 1925, and on whose death the present dispute arose;

(*c*) Rani Abhiraj Kuar, the junior widow of Raja Suraj Prakash Singh, who died before 1925; and

(*d*) Defendant No. 1, the widow of Mahesh Bakhsh Singh, the predeceasing son of Raja Suraj Prakash Singh.

On the 29th June, 1899, an agreement was entered into between the two widows of Raja Suraj Prakash Singh and defendant No. 1, the material portion of which is as follows:—

"Whereas Raja Suraj Pragash Singh, Taluqdar of Gangwal, died childless and intestate, while we, *i.e*, Rani Itraj Kuar, the first widow, Rani Abhairaj Kuar, the second widow, Dulhin Saheba, viz., Jadunath Kuar, widow of Bachcha Mahesh Bakhsh Singh, the son of the late Raja and Rani Achal Raj Kuar, the mother of the deceased Raja, are the heirs, and now we, by mutual consultation, have decided that the mutation of Taluqa Gangwal, Districts Bahraich and Gonda, and purchased Pattis Chaisar, etc., be effected in favour of Rani Itraj Kuar and, during her (Itraj Kuar's) life Rani Abhairaj Kuar, Musammat Dulhin Jadunath Kuar, and Rani Achalraj Kuar, the mother of the deceased Raja, having received the following Bhaiyai villages, which have always remained in the possession of the heirs to the estate and also were held for a long time by Raja Narpat Singh during the Shahi rule, should support themselves because this Bhairai right now belongs to Rani Abhairaj Kuar and Musammat Dulhin Jadunath Kuar, the heirs to the estate, who, after me, Rani Itraj Kuar, shall gradually become the successors."

As Rani Sukraj and Rani Abhiraj Kuar died in the lifetime of Rani Itraj Kuar, defendant No. 1 was in possession of the *gusara* villages at the time of Rani Itraj Kuar's death in 1925.

The Chief Court held that the agreement was a reasonable family settlement, made for the purpose of settling controversies as to the mutation of names consequent on the death of Raja Suraj Prakash Singh, and they further said:

"*Prima facie* a provision for maintenance must be deemed to be intended to enure for the lifetime of the grantee—*Raja Rameshwar Bakhsh Singh* v. *Arjun Singh*[2]. In the present case the provision was to cease earlier, but

2. (1900) L. R. 28 I. A. 1: I. L. R. 23 A. 194 (P. C.).

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only in the event of the grantee coming into the possession of the estate. We are unable to discover anything in the document to justify the interpretation that it was to cease on the death of Rani Itraj Kuar, and during the lifetime of the grantee, when the succession to the estate is withheld from her on a ground not contemplated by the settlement."

Their Lordships find themselves unable to agree with this construction of the agreement, as, in their opinion, the words "during her (Itraj Kuar's) lifetime" do not qualify the antecedent part of the provision, but qualify the subsequent part of the provision, under which alone defendant No. 1 has any claim to the *guzara* villages. It follows that defendant is not entitled to retain possession of these villages, and it is unnecessary to consider whether the settlement was valid and reasonable.

The third appeal involves a question of construction of the Oudh Estates Acts of general importance, which does not appear to their Lordships to have been clearly or adequately placed before either of the Lower Courts, and, in view of the importance and difficulty of the question, their Lordships feel that it will be more satisfactory to have this appeal re-heard before a fuller Board.

Until the advice to be humbly tendered by their Lordships to His Majesty in respect of the third appeal is determined, it will not be possible to settle the terms of the order in respect of the first two appeals.

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD SALVESEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

8th March, 1932. Their Lordships' judgment was delivered by

LORD THANKERTON.—In accordance with the view expressed in the judgment of this Board, dated the 4th December, 1930, the issue raised in the third appeal has been re-heard before a fuller Board. By that judgment it was decided that the succession to the *Taluka* Gangwal is governed by the Oudh Estates Act, and in particular by S. 22 (10), which, as amended in 1910, is as follows:—

"(10) Or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid."

The last *Talukdar* was Raja Suraj Prakash Singh, and the plaintiff's pedigree shows Bhaya Partap Singh as their common ancestor, and in accordance with the previous judgment the

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plaintiff must be held to have established that, in blood relationship, he is the nearest male blood relation according to the rule of lineal primogeniture of Raja Suraj, the last male holder of the *Taluka*. It is clear from the context that this finding relates to physical blood relationship and does not exclude the possibility —raised by the issue in the third appeal—of the legal right of succession, so far as expressed as blood relationship, having been lost, *e. g.*, by adoption.

The sole question in the third appeal is whether the plaintiff has proved that he is an "agnate" of the propositus within the meaning of S. 22 (10); if so, he is admitted to be the nearest male agnate according to the rule of lineal primogeniture.

In the first place, their Lordships are clearly of opinion that the meaning of "male agnate" for the purposes of the section cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute —in this case the Hindu law of succession according to the rules of the Mitakshara. The term "agnate" is not a term of art in the English legal system; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males. In their Lordships' opinion, it is a word expressive of relationship, similar to "son" or "brother," to which the rule of construction laid down in *Raghuraj Chandra* v. *Subhadra Kunwar*[1] falls to be applied. The only express prescriptions of the Act relative to "male agnate" are that it denotes only legitimate relatives (S. 2), and that it applies only to ***najib-ul-tarfain, i.e.,*** those of noble birth on both sides (S. 21). Subject to these qualifications, the meaning of "male agnate" falls to be ascertained by the personal law of the individual, to whom the succession is to be established.

Turning to the law of the Mitakshara, their Lordships have no doubt that "male agnate" denote a *gotraja-sapinda*, as to which an authoritative exposition is to be found in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*.[2] Sir Robert Phillimore, in delivering the judgment of this Board, says (p. 390):

"The *Mitacshara*, in the 5th and 6th sections of the second chapter, recognises two successive classes of heirs: first, 'Gentiles'; next, *Bandhoos*; after them it places certain special persons, and after these last the State, the *ultimus haeres*. Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is

1. (1928) L. R. 55 I. A. 139: I. L. R. 3 Luck. 76: 55 M. L. J. 778 (P. C.).
2. (1870) 13 Moo. I. A. 373.

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still enjoined. The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindoo Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the *Mitacshara* is in the strictest conformity to these principles. The Gentiles, or *Gotraja* (from the *Gotra*), are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing possibly many families, and such original bond of union is regarded as necessary to the constitution of the *Gotra*. These conditions are all that are stated as necessary to the constitution of the class of Gentiles. As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as *Sapindas* and *Samanodacas*; the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs, then, in this case show a common ancestor, a *Gotra*, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text."

From this it is clear that, in order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, viz., (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

It is now settled that *sapinda*-ship under the Mitakshara law arises from the community of corporal particles, and is not dependent on the right to participate in the offering of funeral oblations; the latter may be of importance in settling the order of preference of heirs in the same class, but is not relevant in a question of exclusion from a class of heirs. *Lulloobhoy Bappoobhoy* v. *Cassibai*,[3] *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*.[4] It may further be noted that the *bandhus*, or cognates, have a technical meaning in the system of the Mitakshara and signify the *bhinna-gotra sapindas*, that is, those not belonging to the same *gotra* or family (*Ramchandra, supra cit.*).

The pedigree of the plaintiff in the present suit shows his community of corporal particles with the propositus through a common ancestor, Bhaya Partab Singh, traced through males,

3. (1880) L. R. 7 I. A. 212: I. L. R. 5 B. 110 (P. C.).
4. (1914) L. R. 41 I. A. 290: I. L. R. 42 C. 384: 27 M. L. J. 333 (P. C.).

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and, to that extent, the pedigree has been held proved, as already stated. He has, therefore, satisfied one of the two requisite conditions, *i. e.*, that he is a *sapinda* of the propositus; but the main issue in the third appeal is whether the plaintiff has proved that he satisfies the other condition, namely, that he is of the same patriarchal stock or *gotra*. In the absence of challenge on this point, it might well be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged by defendant No. 2 on this point, it is for the plaintiff to satisfy the Court that he complies with this condition also, before he can succeed in his claim to the succession.

Defendant No. 2 maintains in this appeal that it is established on the evidence that the *gotra* of the propositus was Vaiyaghra, and the plaintiff's *gotra* being admittedly Atri, they cannot be related as agnates (*gotraja sapinda*) under the Mitakshara law, and that, in any event, the plaintiff has failed to prove that the propositus, like himself, belonged to the Atri *gotra*. The plaintiff maintains that the evidence sufficiently establishes that he was of the same *gotra* as the propositus, but that, if this conclusion is not justified, the case should be remitted for further enquiry on this point, as the issue was not fairly or fully raised in its present form at the trial or in the Courts below.

It was ultimately agreed by both parties (*a*) that, if in fact the propositus was of the Vaiyaghra *gotra* and the plaintiff was of the Atri *gotra*, this difference of *gotra* necessarily led to the conclusion that the plaintiff is not an agnate, *i.e.*, *gotraja sapinda*, of the propositus, and (*b*) that such difference of *gotra* could only be accounted for by adoption into a different *gotra*, of the plaintiff or one of his paternal ancestors since the common ancestor, Bhaya Partab Singh.

In the previous judgment their Lordships expressed the view that this issue had not been clearly or adequately placed before either of the Lower Courts, and, after reconsideration before a fuller Board, their Lordships are confirmed in this view.

The question of *gotra* was not raised in the pleadings, written or oral. Defendant No. 2 put the plaintiff to the proof of his pedigree, and his only express contention was that Jugraj Singh, the younger son of Partab Singh, died childless. The

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only issue that could be held to cover this point was No. 7, which is as follows: "Is the plaintiff the nearest heir under the Act by the rule of lineal primogeniture to Suraj Prakash Singh, or under the custom applicable to the family?"

At the trial, *gotra* was first mentioned during the cross-examination of the plaintiff, when he stated "My *gotra* is Atra *gotra*"; he was not further examined on this point by either side. It is next referred to in cross-examination, for defendant No. 2, of two witnesses for defendants 1 and 3 (D. W. 15 and D. W. 18), and is dealt with by a series of witnesses for defendant No. 2. About halfway through this latter body of witnesses a statement by plaintiff's counsel is recorded to the effect that the plaintiff did not admit that the *gotra* of the Gangwal family was Vaiyaghra, but that the Gangwal family belonged to Atri *gotra*.

It seems reasonably clear from the judgment of the trial Judge that difference of *gotra* was only used before him as affecting the question whether Jugraj Singh had died childless, in other words, as involving a break in the blood relationship of the plaintiff with Jugraj Singh. There appears no trace of an argument that, granted the blood relationship, the difference of *gotra* would still negative the plaintiff's claim to be the nearest agnate.

The learned trial Judge held it proved by the defendants' witnesses that the Gangwal *talukdars* were of the Vaiyaghra *gotra*, though he thought that this conclusion was weakened by the fact that that point was not put to the plaintiff or his witnesses in cross-examination; he also thought it possible that the plaintiff might have stated his *gotra* incorrectly or his ancestors might have forgotten to what *gotra* they belonged and then taken whatever *gotra* was suggested by their *prohits* or priests. On consideration of Sastri's Treatise on Hindu Law and Dr. Gour's Hindu Code, he came, apparently reluctantly, to the conclusion that it is possible that persons descended in the male line from a common ancestor can belong to two different *gotras*, and stated "whatever the explanation of the difference of *gotras* may be, I am not prepared to accept this difference as conclusive proof that the plaintiff and his family are not agnatic relations of the *talukdars* of Gangwal in the manner claimed. Counsel for defendant 2 should have put his case to the plaintiff in cross-examination. Probably he feared that if

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he did so the plaintiff might be able to explain the apparent difficulty. I think it is impossible to explain away the admissions made by Raja Sitla Bakhsh Singh and his *Mukhtar* to which I have referred above." The admission referred to was made in a suit in 1868 by Sheo Nath, the plaintiff's father, against Raja Sitla, the first *talukdar* of Gangwal, claiming that certain villages had been given as *bhayai* to the plaintiff's ancestors; in his answer the Raja stated "The plaintiffs do belong to the defendant's family, but these villages were not given to them as a *bhayai, i.e.*, portion. Defendant's ancestors gave Gularia to plaintiff's ancestor in 1244 as *jagir*." The learned Judge also referred to the conduct of Rani Itraj Kuar in 1900, when Sheo Nath Singh made an application to have the estate taken under the Court of Wards on the ground of mismanagement by Rani Itraj Kuar and the detriment to himself as next reversioner, and the omission of the Rani to suggest that Sheo Nath Singh was in no way related to the *Talukdar's* family and therefore had no *locus standi* to present the application. The learned trial Judge concludes:

"In my opinion, therefore, the plaintiff has satisfactorily established his agnatic relationship to Raja Suraj Prakash Singh in the manner set forth in his pedigree."

Their Lordships are satisfied that the admissions of Raja Sitla and conduct of Rani Itraj Kuar do not involve any admission as to identity of *gotra* between the two families.

The Chief Court, in their judgment, say:

"On the question of the plaintiff's relationship with Raja Sitla Bakhsh Singh" [? Raja Suraj Prakash Singh] "the case put forward and argued before us on behalf of Lal Harihar Partab Bakhsh Singh, the defendant-appellant in Appeal No. 19, is that Jugraj Singh, the second son of Partap Singh, died issueless, or at least that the plaintiff has failed to prove that he is the descendant of Jugraj Singh. It was not disputed that Jugraj Singh was one of the two sons of Partap Singh. We agree with the trial Court that the plaintiff has succeeded in establishing the fact that he is the descendant of Jugraj Singh according to the line of descent indicated in the pedigree above set forth. The evidence seems to be overwhelming and there is no evidence worth the name in rebuttal."

After dealing with the evidence, including the admissions of Raja Sitla about 1868, the learned Judges state:

"In agreement with the trial Court, we therefore hold that the plaintiff has succeeded in establishing the fact that he is an agnate of the late Suraj Prakash Singh."

It is obvious that the word "agnate" is loosely used in that finding, for after disposing of a question as to the seniority of the plaintiff's line, which was not in dispute before this Board, the judgment proceeds:

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"Against the broader question of relationship, which we have decided in agreement with the trial Court in favour of the plaintift, the only argument advanced on behalf of the defendants and particularly Lal Harihar Pratap Bakhsh Singh, defendant No. 2, is that the plaintiff and Raja Suraj Prakash Singh could not be held to be related to each other, in spite of all the evidence to the contrary, on the ground that the two belonged to different *gotras*. On the face of it the argument is highly technical and its pursuit has landed us into the region of Hindu tradition."

After quoting the first part of the passage cited above from the judgment of this Board in *Bhyah Ram Singh's* case[2] the learned Judges state:

"Technically and *prima facie*, therefore, if the plaintiff and the *talukdar* of Gangwal are descended from a common ancestor, they should have one and the same *gotra*"

Differing from the trial Judge's view of the evidence as to the *gotra* of the *talukdar* of Gangwal, the learned Judges considered that the matter was not free from doubt, and suggested that there were two meanings of *gotra*, one technical and the other popular. They seek to attribute to the plaintiff's use of the term *gotra* a so-called popular meaning as referring to his being a Sombansi, and they conclude as follows: "On these grounds we are unable to give effect to this argument as sufficient to outweigh the direct and positive evidence as to the relationship of the two families."

As already indicated, their Lordships are of opinion that *gotra* has only one meaning, and they find it difficult to believe that, if the question now raised had been clearly in issue *ab initio*, there would have been any difficulty in producing evidence to identify beyond judicial doubt or speculation the *gotras* of the plaintiff and of Raja Suraj Prakash Singh. Their *gotras* must be well known to relatives who attended the *Sraddh* ceremonies, at which the *gotra* of the three paternal ancestors is recited, and such evidence is conspicuous by its absence. There should be no need to resort to the "region of Hindu tradition".

Their Lordships are therefore of opinion that the case should be remitted to the Chief Court in order that the plaintiff may have the opportunity of establishing the identity of his *gotra* with that of Raja Suraj Prakash Singh; upon this issue his success or failure in his claim to the *taluka* will now depend.

In accordance with the previous judgment of this Board, dated the 4th December, 1930, and this judgment, their Lord-

2. (1870) 13 Moo. I. A. 373 at 391.

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ships will humbly advise His Majesty as follows:—That the decree of the trial Judge, dated the 4th January, 1927, be recalled except in so far as it dismisses the plaintiff's claim in respect of the property mentioned in Schedules B, C, E and F appended thereto, that the decrees of the Chief Court in Civil Appeals Nos. 19 and 24 of 1927 be recalled; that the first appeal (No. 102 of 1929) be dismissed, the appellant (defendant No. 1) to pay the plaintiff's costs of the appeal and of Civil Appeal No. 24 of 1927; that the second appeal (No. 103 of 1929) be allowed, the appellant's costs to be paid by defendant No. 1; that the third appeal (No. 104 of 1929) be allowed without costs, and the case be remitted to the Chief Court as above proposed, the costs of all parties in the trial Court, of the parties in Civil Appeal No. 19 of 1927, and of further procedure to be adjudged by the Chief Court.

Solicitor for plaintiff: *H. S. L. Polak.*

Solicitors for defendant No. 1: *Watkins and Hunter.*

Solicitors for defendant No. 2: *Douglas Grant and Dold.*

K. J. R. *Decrees of the Chief Court varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Alimane Sahiba .. *Petitioner** (*Plaintiff*)

v.

Kolisetti Subbarayudu .. *Respondent* (*Defendant*).

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Stamp Act (*II of* 1899), *Ss.* 12 *and* 36—*Promissory note—Unstamped document—Inadmissibility—Admission in evidence of unstamped document and marked as exhibit—Whether its admissibility could be reopened—Simultaneous execution of note with the advance of loan on the same day —Whether suit can lie on the original cause of action.*

In a suit by the plaintiff on a promissory note the defendant admitted execution of the note but pleaded discharge. When the argument upon the question of discharge was proceeding the defendant discovered a legal objection to the maintainability of the suit on the ground that the stamp affixed to the note had not been cancelled as required under S. 12 of the Stamp Act and that the promissory note should accordingly be treated as unstamped. At that stage plaintiff came with an application for amending the plaint by inserting certain allegations to the effect that money was lent on the same day and as such he was entitled to sue on the debt apart from the promissory note. The promissory note in question had been exhibited in evidence and marked as exhibit in the case.

Held, that having regard to the finding of the Lower Court that the loan as well as execution of the promissory note were simultaneous the decision in *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi*, (1913) I. L. R. 38 Mad. 660: 26 M. L. J. 19, applied and hence the suit could not be maintained.

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* C. R. P. No. 841 of 1929. 4th April, 1932.

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Held, further, that once the document had been admitted in evidence and marked as exhibit, then having regard to the provisions of S. 36 of the Stamp Act, its admissibility could not be reopened on the ground of the document not having been duly stamped.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Nellore in Small Cause Suit No. 861 of 1928.

T. V. Ramanatha Aiyar and *S. Sitaraman* for petitioner.

K. Umamaheswaran for respondent.

The Court delivered the following

JUDGMENT.—This revision petition has been filed by the plaintiff in S. C. Suit No. 861 of 1928 on the file of the District Munsif's Court, Nellore. The plaintiff instituted the above small cause suit on the footing of a promissory note, dated 4th August, 1925, executed by the defendant in plaintiff's favour for Rs. 180. The plaint was filed on 4th August, 1928, namely, the last day of the period of limitation for filing a suit on the promissory note. The defendant, after obtaining time to file a written statement, filed a written statement on 1st October, 1928, in which he admitted the execution of the promissory note sued on but pleaded discharge. Subsequently, as the learned District Munsif remarks in his judgment, "when the argument upon the question of discharge was proceeding, the defendant discovered a legal objection to the maintainability of the suit on the ground that the stamp affixed to the promissory note had not been cancelled as required by S. 12 of the Stamp Act and that the promissory note should accordingly be treated unstamped for any purpose." The learned District Munsif, after noting that the stamp on the promissory note was in no way cancelled but remained intact without any marks on the same, came to the conclusion that the promissory note must be taken to be unstamped and accordingly inadmissible in evidence. At that stage, the plaintiff came with an application for amending the original plaint by inserting certain allegations to the effect that money was lent to the defendant the same day, though a promissory note was also executed by the defendant on the same day, and claiming that the plaintiff would be entitled to recover the money, as money lent, even though the promissory note be held to be inadmissible in evidence. The learned District Munsif, as I read his judgment, understood the case of the plaintiff to be that the advance of the loan and the

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execution of the promissory note were simultaneous; and relying on the decision of this Court in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] he came to the conclusion that the plaintiff was not entitled to recover even on the foot of the new allegations, seeing that the promissory note was inadmissible in evidence. He accordingly dismissed the suit. The plaintiff has preferred the present revision petition.

The question was elaborately argued before me whether a plaintiff who takes a promissory note in respect of moneys advanced by him to the defendant the same day would be entitled to recover on the footing of the money advanced in cases where the promissory note is inadmissible in evidence. The learned advocates who argued the case before me drew my attention to the difference of opinion that apparently exists on this point between the decisions of the several High Courts in India. It was submitted that the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] by Sadasiva Aiyar and Spencer, JJ. is clear that, in a case where the advance of the money and the execution of the promissory note are simultaneous, it would be against the policy of S. 91 of the Indian Evidence Act to allow the plaintiff to recover on the footing of money advanced when the promissory note is inadmissible in evidence. It was also mentioned to me that that decision of the learned Judges has been subsequently followed in this Court in other cases, though it must be said, that in none of the other cases, to which my attention was drawn, were the advance of the loan and execution of the promissory note simultaneous and part and parcel of the same transaction. The view held by the learned Judges in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] has been accepted by a Full Bench of the Allahabad High Court in the case reported in *Nasir Khan* v. *Ram Mohan*[2]. The view of the Lahore High Court would also appear to be the same. See *Chanda Singh* v. *The Amritsar Banking Co.*[3] and *Gurdas Mal Singh* v. *Ishar Das*[4]. The decisions of the Calcutta, Patna and Rangoon High Courts would seem to be different in this respect. See *Sudhir Chandra Das* v. *Gobinda*

1. (1913) I. L. R. 38 M. 660: 26 M. L. J. 19.
2. (1930) I. L. R. 53 A. 114 (F. B.).
3. (1921) I. L. R. 2 Lah. 330 at 334. 4. (1921) 3 L. L. J. 157.

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Chandra Roy,[5] *Ram Ragubhir Lal* v. *The United Refineries (Burma), Ltd*.[6] and *Dhaneswar Sahu* v. *Ramrup Gir*[7]. The decisions in *Krishnaji Narayan* v. *Rajmal Manikchand*[8] and *Jacob and Co*. v. *Vicumsey*[9] would also seem to be against the Madras view. In the latest Bombay case reported in *Jacob and Co*. v. *Vicumsey*[9] one learned Judge of that Court divided cases that are likely to occur under such circumstances into three classes, and would seem to be of the opinion that, in cases where the loan and the promissory note form part of the same transaction, the plaintiff would not be entitled to recover, though in the other two cases put by the learned Judge the plaintiff would be entitled to recover. Illustration (*b*) of S. 91 of the Indian Evidence Act would also *prima facie* seem to be against the plaintiff in such cases. The learned Judges in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1], when informed by counsel of the fact that other High Courts have taken a different view, declined, as I understand their judgment, to have the decision of the Madras High Court re-opened on this point but were quite satisfied that the Madras view should be followed in this Presidency. Now, if the question arose in that neat form, namely, when the advance of the loan and the execution of the promissory note are simultaneous and form part of the same transaction, there is no doubt that I would be bound by the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] by a Bench of this Court, and the circumstance that some of the other High Courts have come to a different opinion on this matter is not really of very great use to me. It was also mentioned to me that in *Somaraju* v. *Venkatasubbarayudu*[10] a learned Judge of this Court even declined to have a case said to raise a similar point referred to a Bench of two Judges. It being then clear that my duty, in a case involving the same question, would be to follow the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] the question arises, what exactly is the finding of the learned District Munsif in the present case? The District Munsif had before him the original

1. (1913) I. L. R. 38 M. 660 : 26 M. L. J. 19.
5. (1917) I. L. R. 45 C. 538.
6. (1930) I. L. R. 9 Rang. 56. 7. (1928) I. L. R. 7 Pat. 845.
8. (1899) I. L. R. 24 Bom. 360. 9. (1926) 29 Bom. L. R. 432.
10. (1924) 20 L. W. 943.

plaint, which apparently contained a rather clear statement relevant to the question that I am now considering, and also the allegations in the application for amendment filed by the plaintiff. The learned District Munsif came to the conclusion that in the present case the loan and the execution of the promissory note should be taken to be simultaneous. I do not find any trace in the Lower Court's proceedings that the plaintiff wanted to let in any further evidence on this point; and I see no sufficient reason why the finding of the Munsif should not be accepted by me. So far as this portion of the case is concerned, then, having regard to the finding of the Munsif, as I understand the same, and having regard to the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1] the first argument raised by the learned advocate for the plaintiff-petitioner before me should be overruled.

But, in my opinion, this does not, by itself, settle the question. An application for amendment of the plaint was made in the Lower Court, as already mentioned by me. The plaintiff who wants to have the plaint amended by including a cause of action based upon something other than the execution of the promissory note, will have to make other material averments in order to entitle him to a decree, in spite of and outside the promissory note. The question will arise whether he would be entitled, in such circumstances, to have such an amendment made. If I had to consider on the merits, the plaintiff's application to amend the plaint in the present case, then, a recent decision of a learned Judge of the Bombay High Court in *Burjorji* v. *Hormusji*,[11] will be relevant and will have to be carefully considered. In the present case there is the further circumstance that the plaintiff filed her plaint on 4th August, 1928—that is, on the last day of three years from 4th August, 1925—whether there were two transactions, one independently of the other, or there was only one transaction, on 4th August, 1925. *Prima facie*, therefore, a plaintiff, who wants to have a new cause of action added to the plaint long after the period of limitation for enforcing that cause of action had expired, would have a difficult point to get over, and I am not surprised that in the present case the District Munsif was not inclined to allow the amendment, having also regard to the fact that, if a fresh

1. (1913) I. L. R. 38 M. 660: 26 M. L. J. 19.
11. (1931) 34 Bom. L. R. 643.

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suit had then been filed on the new cause of action, the same would admittedly be barred by limitation. Having regard to the view I take on two other points that I am going to mention, I do not think it necessary for me to give a decision on the question whether the plaintiff is entitled to have the amendment prayed for in this case.

Two more points remain for consideration. The first is, what is the effect of the admission made by the defendant in the written statement filed by him on 1st October, 1928, admitting the allegations in the plaint and the promissory note on which the suit was based? The only defence raised in the written statement was one of discharge, and from the notes-paper I find that that is the view that the District Munsif also took of the written statement. Having then admitted execution of the promissory note but only pleaded discharge, I have to consider the effect of S. 58 of the Indian Evidence Act on the rights of the parties to the present case. Under S. 58 of the Indian Evidence Act "no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing they agree to admit by any writing under their hands,. . . . provided that the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions". I may state that, so far as I understand the proceedings in this case, the District Munsif has not thought it necessary to call in aid the proviso attached to the section. I find that the note he made in the notes-paper is that "the defendant admitting the promissory note pleads discharge" and the only question for consideration, therefore, is "the plea of discharge". The defendant having admitted the execution of the promissory note but having only raised a plea of discharge, what is the effect of the subsequent discovery made by the defendant that the promissory note was not "duly stamped"? As I said, the objection relating to the promissory note not being duly stamped arises from the circumstances that, though the promissory note has a proper stamp affixed to it, there are no indications on the stamp of the same having been in any manner cancelled as required by S. 12 of the Stamp Act. Under the provisions of S. 12, therefore, it must be taken that this promissory note was not duly stamped, and accordingly, if any question arose as to its admissibility in evidence, the same may have to be held to be

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inadmissible. But having regard to the provisions of S. 58 of the Evidence Act just referred to by me, facts admitted need not be proved, and therefore the circumstance that the promissory note was not admissible in evidence is immaterial for the purposes of this case. The whole discussion turning on the inadmissibility of the promissory note is, as far as I am able to see, quite irrelevant in the circumstances, having regard to the defendant's admission referred to by me.

The second point that has to be considered is this: the promissory note in question has been exhibited and marked as Ex. A in this case. I have looked into the document. It bears an endorsement to the following effect:—"Produced on 4—8—28 by plaintiff's pleader, admitted by the defendant in his written statement on 10—12—28 and filed as Ex. A"; then there is the initial or signature of the District Munsif. The usual appendix of list of documents filed and witnesses examined, attached to the judgment, also contains these remarks:—"Ex. A, 4—8—25, suit promissory note". Now, when once this document has been admitted in evidence and marked as an Exhibit, then having regard to the provisions of S. 36 of the Indian Stamp Act, its admissibility could not be re-opened on the ground of the document not having been duly stamped. That position being clear under the provisions of S. 36 of the Stamp Act, the whole discussion would thus seem to be entirely unnecessary, and for no purpose, so far as the facts of this case are concerned.

The result, therefore, is this. So far as the present case is concerned, I must take it that the promissory note sued on is admitted by the defendant. It has further been exhibited and marked as Ex. A. The plea raised by the defendant, namely, discharge, has to be tried, and the basis for the dismissal of the suit by the District Munsif, viz., that the promissory note has not been duly stamped, either does not in the circumstances arise, or, is no longer available, as the document has been admitted having regard to the provisions of S. 36 of the Indian Stamp Act.

For the above reasons, I reverse the order passed by the learned District Munsif on 14th December, 1928, and remand S. C. S. No. 861 of 1928 for disposal in accordance with law.

As regards the costs of this revision petition, I must state that the plaintiff's conduct in this case, in not having drawn the attention of the Lower Court to the admission in the written

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statement and to the provisions of S. 36 does not, in my opinion, justify the costs of the present Civil Revision Petition being awarded to her. The order, therefore, as to the costs of this petition is that each party will bear the costs of the revision petition. The costs of the suit will be provided for by the District Munsif in the final decree to be passed by him.

K. C. *Reversed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Mattapalli Venkataratnam and others.. *Appellants** (*Plffs.*)

v.

Tota Varahaliah and another .. *Respondents* (*Defts.*).

Venkataratnam *v.* Varahaliah.

Transfer of Property Act (IV of 1882), Ss. 55 and 58 (d)—Mortgage of leased out properties—Lessees in possession—Deeds reciting them as mortgages with possession—Covenant to pay amount within specified period and in default mortgagees to recover by sale of property mortgaged, etc.—Suit by mortgagees to eject lessees after termination of their period of lease—Nature of mortgage whether simple or usufructuary—Mortgagees whether had right to eject lessees.

Certain lands in the possession of lessees, defendants in the suit, were mortgaged by their owner to the plaintiffs under deeds. The deeds were styled deeds of mortgage with possession and contained an express covenant to pay the entire balance within three years coupled with a further provision that in case of default on such payment the mortgagees might recover the money due by means of the mortgaged property and also from the mortgagor personally. The plaintiff sued to eject the defendants from the suit lands as the period of lease granted to them was over.

Held, that the deed of mortgage evidenced a combination of a simple mortgage and an usufructuary mortgage. In their capacity as usufructuary mortgagees the plaintiffs would be entitled to recover not only the rents due on the suit lands but also to eject the defendants after the expiration of the term of their lease, and get possession of the same for appropriating the profits thereof towards the mortgage debt.

Moti Ram v. *Vitai*, (1888) I. L. R. 13 Bom. 90 (F. B.), followed.

Bisheshar Bakhsh Singh v. *Debi Bakhsh Singh*, (1912) 17 I. C 329 and *Partab Bahadur Singh* v. *Gajadhar Baksh Singh*, (1902) L. R. 29 I. A. 148: I. L. R. 24 All. 521 (P. C.), referred to.

As usufructuary mortgagees plaintiffs had whatever power of ejectment that might be exercisable by the mortgagor.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 54 of 1926.

Ch. Raghava Rao and *D. Krishnaswami* for appellants.

The Government Pleader (*P. Venkataramana Rao*) and *S. Kanakam* for respondents.

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*Appeal No. 470 of 1930. 27th April, 1932.

Venkataratnam v. Varahaliah.

Sundaram Chetty, J.

The Court delivered the following

JUDGMENTS. *Sundaram Chetty, J.*—The plaintiffs (appellants) have filed the suit out of which this appeal has arisen to recover possession of 51 acres and 20 cents of land in the village of Veeravaram, from the defendants, together with arrears of rent and mesne profits for the year 1925. Various contentions were set up by the defendants in their written statement. Issue 2 runs thus :

"Whether the plaintiffs are entitled to eject the defendants and obtain possession."

The first part of issue 3 is :

"Whether the defendants are tenants of plaintiffs."

These two points were found by the Subordinate Judge against the plaintiffs, and, as a result of his findings, he has dismissed the plaintiffs' suit without going into the other issues framed in the suit.

Plaintiffs' case is, that one Venkataraghaviah became the owner of the suit lands, and that by virtue of the two registered deeds (Exs. A and B) executed by him in their favour, they must be deemed to be usufructuary mortgagees, entitled to collect the rents due by the defendants under Ex. D, which were executed by them on 30th December, 1908, and to eject them from the suit lands, as the period of lease (15 years) granted to them under Ex. D was over by the end of fasli 1334.

So far as the suit lands are concerned, Exs. A and B are both styled as deeds of mortgage with possession. There is no doubt, that on the dates of these deeds, the suit lands were in the occupation of the defendants as lessees under Ex. D. The position of the mortgagor was that of a lessor in respect of these lands when he created these mortgages. A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of a debt. S. 58 of the Transfer of Property Act defines four kinds of mortgages. The question for consideration is, whether the deeds, Exs. A and B, evidence any one of those mortgages, and if so, what kind of mortgage it is. It is contended for the defendants (respondents) that the mortgage created thereunder is only a simple mortgage, and therefore the plaintiffs are not entitled to ask for possession of the suit lands, ejecting the defendants therefrom. Unless the mortgage in favour of the plaintiffs can be deemed to be an usufructuary mortgage, their present suit

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in ejectment must fail. There is also a third alternative. If the deeds evidence a combination of simple and usufructuary mortgages, the mortgage would be an anomalous mortgage, in which case the intention of the parties should be gathered from the terms of the instrument as controlled by the provisions of the Act. The rights and liabilities of the parties have to be determined by their contract.

For a discussion of this question, it is enough if the provisions of Ex. A are referred to. Though it is styled as a mortgage with possession, there is an express covenant to pay the entire balance of principal and interest in 3 years, coupled with a further provision, that in case of default in such payment, the mortgagees may recover the money due, by means of the mortgaged property and also from the mortgagors personally. These are the ingredients of a simple mortgage, and so far as these provisions are concerned, the deed sounds like a simple mortgage deed. The more difficult question is, whether it evidences an usufructuary mortgage also. The definition in S. 58 (*d*) of the Transfer of Property Act (as it stood before the Amending Act XX of 1929) would apply to Ex. A. The transaction would be an usufructuary mortgage, where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property, in lieu of interest, or in payment of the mortgage money. The delivery of possession of the mortgaged property is thus an essential ingredient of an usufructuary mortgage. It has to be seen whether the delivery of constructive possession of the mortgaged property, which the owner has at the time of the mortgage, as it is in the physical occupation of a tenant by reason of a lease having been previously granted to him for a term, would suffice to bring the transaction within the aforesaid definition. In the case reported in *Palani* v. *Selambara*,[1] relied on by the learned advocate for the appellants, the learned Judges have considered what would amount to delivery of possession of land, mentioned in S. 48 of the Registration Act. The learned Judges held, that it is not confined to delivery of actual or physical possession, but delivery of constructive possession, by directing the tenants in occupation to pay their rents to the vendee, and by the tenants

1. (1886) I. L. R. 9 M. 267.

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agreeing to do so. The principle of the decision seems to be, that the transfer of such possession as the vendor had at the time of sale, according to the circumstances of the interest he had in the property, would be delivery of possession within the meaning of that section. In the present case, the mortgagor has under the deed Ex. A transferred to the mortgagees the right to collect the rents due in respect of the suit lands from the tenants in occupation thereof, *viz.*, the defendants, authorising them to receive the rents and appropriate the same towards interest and principal. It is alleged in para. 7 of the plaint that as soon as Ex. A was registered, the mortgagor Venkata Raghavayya issued a registered notice to the defendants, directing them to pay the rents due as per the lease deed, Ex. D, to the mortgagees (plaintiffs). This fact is admitted by the defendants in para. 7 of their written statement, as also the fact of their having paid the rents to the 1st plaintiff accordingly for some years. In the face of these circumstances, we must take it, that there was delivery of constructive possession of the mortgaged lands, under Ex. D, which is as efficacious as delivery of actual physical possession, as was held in *Palani* v. *Selambara*.[1] There is a further provision in Ex. A, which is clearly indicative of an intention to create an usufructuary mortgage. On the date of this deed, the mortgagor was able to put the mortgagees in constructive possession only, and he did give such possession. According to the settlement with the mortgagees, he should also deliver them actual possession of the suit lands under this deed on the expiration of the term of lease granted to the defendants, and, for that purpose, a clause is added in Ex. D authorising the mortgagees to take possession from the tenants (defendants) and appropriate the rents and profits towards the mortgage debt.

The contention of Mr. Venkataramana Rao for the respondents, if I understood him aright, seems to be, that unless one is in actual physical possession of immovable property, there is no possibility for him to create an usufructuary mortgage. This argument is based on the view that delivery of possession mentioned in S. 58 (*d*) can only mean delivery of actual physical possession. For the reasons stated by me, this view seems to be an untenable position. In dealing with an instrument analogous to Ex. A in some important features, which

1. (1886) I. L. R. 9 M. 267.

Venkata-ratnam v. Varahaliah.

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came up for consideration by a Full Bench of the Bombay High Court in *Motiram* v. *Vitai*,[2] Sargent, C. J., held that it came under the class of mortgages termed "simple mortgages usufructuary", one of the analogous mortgages referred to in S. 98 of the Transfer of Property Act. By reason of the covenant to pay within four years, the instrument partook of the character of a simple mortgage, but by reason of the clause, that in default of such payment, the mortgagee should take possession and management of the mortgaged property, it was also an usufructuary mortgage. The following observation of Birdwood, J., at page 100 is pertinent to the present case:—

"Where, however, a right of entry is given to the creditor, there is a transfer of an interest in immovable property just as much as if possession were actually transferred. The delivery of possession of mortgaged property is recognised in the Transfer of Property Act as a transfer of such an interest, for usufructuary mortgages clearly come within the general definition of a mortgage given in S. 58 (*a*)."

As found in that deed, there is an express recital in Ex. A also, *viz.*, "we have executed this mortgage deed with possession to you." This shows that the intention of the parties was to create a possessory mortgage, though delivery of actual possession was to be on a future date. The view adopted in *Motiram* v. *Vitai*[2] has been taken in the decision reported in *Bishcshar Bakhsh Singh* v. *Debi Bakhsh Singh*,[3] following the Privy Council decision in *Pratab Bahadur Singh* v. *Gajadhar Baksh Singh*.[4]

I am, therefore, of opinion that the deed Ex. A evidences a combination of a simple mortgage and an usufructuary mortgage. In their capacity as usufructuary mortgagees, the plaintiffs would be entitled to recover not only the rents due on the suit lands (as per Ex. D), but also to eject the defendants after the expiration of the term of their lease, and get possession of the same, for appropriating the profits thereof, towards the mortgage debt. Plaintiffs would, of course, not be entitled to eject the defendants, unless the mortgagor has such a right. But the learned Subordinate Judge has not gone into the question of the mortgagor's right to eject. Plaintiffs stand in the shoes of the mortgagor, and can enforce his right, in the present suit.

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2. (1888) I. L. R. 13 B. 90 (F. B.). 3. (1912) 17 I. C. 329.
4. (1902) L. R. 29 I. A. 148: I. L. R. 24 A. 521 (P. C.).

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If the plaintiffs can eject the defendants on the strength of the title of the mortgagor to the suit lands, it is unnecessary to establish the relationship of landlord and tenant, between them and the defendants. I think, such a relationship has not been created, in the absence of a complete assignment of Ex. D in favour of the plaintiffs. But under the terms of Ex. A, the right to collect the rents is transferred to them, and even as transferees of an actionable claim, they would be entitled to recover the rents from defendants in this suit. The Lower Court has ignored this aspect completely, and non-suited the plaintiffs.

The finding of the Lower Court on the preliminary issue No. 2 is set aside. As I hold that the relationship of landlord and tenant as between the plaintiffs and defendants is not made out, I confirm the Lower Court's finding on the first part of the third issue.

I would set aside the decree of the Lower Court and remand the suit for trial on the other issues and disposal. The appellants will get their costs of this appeal from the respondents. The costs of suit will abide the result. The Court-fee paid on the memorandum of appeal will have to be refunded to the appellants.

Curgenven, J.

Curgenven, J.—My learned brother, whose judgment I have had the advantage of reading, has given reasons, in which I concur, for holding that the mortgages created by Exs. A and B possessed an usufructuary character, although they may not have been usufructuary mortgages pure and simple, as defined in S. 55 of the Transfer of Property Act. There is, it is true, a covenant to pay the mortgage debt within three years but there is no reason for holding that a stipulation of that kind will deprive a mortgage of any usufructuary character which it would otherwise possess. I do not understand Mr. Venkataramana Rao to have gone so far as that. He rather took the line that a property under lease, as was this property, could not be usufructuarily mortgaged because no such possession as such a transaction would require could be given; that possession must be physical and actual, and not merely constructive. This [illegible] think, a tenable view. The definition of an usufruc[illegible]tgage already referred to expressly contemplates the [illegible] receiving "the rents and profits accruing from the [illegible]and there can be no ground for holding that a rent

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is not a form of usufruct equally with other receipts more directly derived from the land. In a case where property is under lease the mortgagor gives his mortgagee such possession as it is capable of, and the mortgagee, who takes possession by assuming the right to receive rents from the tenants, gains his usufruct in such form as the property is capable of yielding. These propositions appear to me elementary and in no need of support from authority. There can be no doubt that in the present case the plaintiff entered into possession as mortgagee, and indeed received rent from the tenants for several years. It has not been disputed that, granting the position set forth above, the plaintiff would be entitled to a decree for rent. It must follow, too, from his position as usufructuary mortgagee, that he has whatever power of ejectment might be exercisable by his mortgagor. I agree with the orders proposed by my learned brother.

K. C. *Decree of Lower Court set aside and suit remanded to be tried on other issues.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN PANDALAI.

A. M. P. R. Muthuraman Chetty by agent Subramania Aiyar and others .. *Petitioners** (*Plaintiff and Defendants* 25, 26 *and* 31 *transposed as party Plaintiffs*)

v.

Sivasubramania Chetty and others .. *Respondents* (*Defendants Nos.* 1 *to* 12).

Muthuraman Chetty v. Sivasubramania Chetty.

Court Fees Act (*VII of* 1870), *S.* 17—*Applicability—Single mortgage in favour of several creditors—Suit to enforce—Court-fee payable as on single subject.*

Where certain creditors, who had taken for their common protection a mortgage for the entire sum due to them in lieu of their separate claims against the debtor, sued to enforce the mortgage as a whole for their common benefit,

Held, that Court-fee was payable on the entire amount claimed as one subject and that the suit did not embrace distinct subjects within the meaning of S. 17 of the Court Fees Act.

In re *Parameswara Pattar*, (1930) I.L.R. 54 M. 1 : 59 M.L.J. 4 relied on.

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*C. R. P. No. 1278 of 1931. 10th M

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Seth Bansiram Jashamal v. *Gunna Naga Aiyar*, (1930) 59 M.L.J. 928, distinguished.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 4th September, 1931 and made in O. S. No. 301 of 1928.

T. Krishnaswami Aiyangar and *S. K. Narasimhachariar* for petitioners.

The Government Pleader (P. Venkataramana Rao) and *M. Krishna Bharathi* for respondents.

The Court delivered the following

JUDGMENT.—The question is whether the suit brought by the petitioners (plaintiffs) embraces two or more distinct subjects within the meaning of S. 17 of the Court Fees Act so as to require them to pay Court-fees separately on each of the said subjects.

The suit is on a mortgage in favour of the nine plaintiffs for a total sum of Rs. 38,376-4-8 and interest thereon mortgaging all the properties of the defendants who had been traders and in the course of trade became indebted to the nine plaintiffs in different sums which together made up the total mortgage principal. In one sense, *i.e.*, before the mortgage, it is quite true that the plaintiffs had only separate claims against their debtor. That is the sense in which the Lower Court's opinion that the claim of each of the plaintiffs in the mortgage amount is a separate subject is right. But that by no means concludes the question whether the creditors having taken for their common protection a mortgage for the entire sum due to them, there does not arise thereby a new and independent cause of action common to them all no doubt springing from their former and separate claims but distinct from it to enforce the mortgage as a whole for their common benefit and share rateably in the proceeds. That that was the intention is clear from the facts. The Lower Court has ignored the aspect of the matter that whatever the rights of the creditors before the mortgage, they have individually under the mortgage no priority against each other, and are not entitled to claim the whole of their dues from the proceeds of the security but must share them rateably according to the sums due to each as set out in the deed. There is nothing in the deed expressly enabling each of the nine plaintiffs to sue for his own dues under the mortgage or the mortgagors to

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redeem the security in parts by paying each of the plaintiffs separately. The suit is for the entire amount against the whole property. The case is analogous to a suit by trustees or the holders of debentures of a series, secured by a mortgage in which case the suit to enforce the security must be brought on behalf of all and the Court will not give judgment in favour of one such holder as by so doing he will be put in a better position than the others. (Simonson on Debentures, 4th Edition, pp. 349 and 350 citing In re *Uruguay Central and Hygueritas Railway Company of Monte Viedo*[1] and *Hope* v. *Croydon and Norwood Tramways Company*.[2])

The case cited by the learned Judge in *Seth Bansiram Jashamal* v. *Gunnia Naga Aiyar*[3] is not in point. That was a case where one of several mortgagees to whom separate amounts were due as tenants-in-common sued for the amount due to himself and the question was whether he could maintain a suit for part of a mortgage money or must sue for the whole. It was held relying on *Sunitibala Debi* v *Dhara Sundari Debi Chowdhurani*[4] that S. 67 of the Transfer of Property Act is not a bar to such a suit and it followed that the plaintiff could not be asked to pay Court-fees on the amount due to the other mortgagees for which he did not sue. That decision does not touch the question whether in a suit brought for the entire amount due on a mortgage by persons who though as between themselves entitled to portions of that amount have a common interest in the whole Court-fees should be paid on the whole sum as one claim or on the several portions as separate claims. In such a case it seems to me incorrect to say that because separate suits by each sharer may be possible, when a suit for the whole amount due on a mortgage is brought by all mortgagees together the suit embraces not one subject but as many different subjects as there are persons entitled to the proceeds of the mortgage. If such were the case a suit on a mortgage taken by the heirs of a deceased Mahomedan for a debt due to him, on the proceeds of which they are *ex hypothesi* entitled to distinct shares, would be one embracing not one subject but distinct subjects. This would in my opinion be straining the language of the section in view of the decisions referred to by the learned

1. (1879) 11 Ch D. 372 2. (1887) 34 Ch. D. 730.
3. (1930) 59 M. L. J. 928.
4. (1919) L. R. 46 I. A. 272: I. L. R 47 Cal. 175: 37 M. L. J. 483 (P. C.).

Judge which show that even where a plaintiff could have brought different suits, *e.g.*, for the price of goods sold on different dates, a suit for the price of a series of sales is one subject for the purpose of Court-fees. See also *Parameswara Pattar*, In re[5] and the decision in *The Rajah of Vizianagram* v. *The Government.*[6]

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The order of the learned Judge is set aside. The costs of this petition will be costs in the cause and will be provided for in the decree.

B. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Manikya Nayanim Varu and others .. *Appellants** (*Defendants 3 to 7*)

v.

Lakshminarasimha Sastrulu and others .. *Respondents* (*Plaintiff and Defendants* 1 *and* 2 *and* 8 *to* 10).

Manikya Nayanim Varu *v.* Lakshminarasimha Sastrulu.

Civil Procedure Code (*V of* 1908), *S.* 2 (11)—*Proper legal representatives not brought on record—Third party without title or possession bringing himself on record—Decree obtained against—Enforceability against real legal representatives—Estoppel—Specific plea necessary.*

If the plaintiff wants to rely upon an estoppel, either as a rule of evidence or as part of the substantive law, he must set up such a plea specifically in the plaint making the necessary averments for sustaining the plea.

The widow of the last male owner brought a suit against the tenants for Rs. 3,863 as arrears of rent. The tenants in turn claimed that a sum of Rs. 16,000 was due to them on account of certain expenses of litigation incurred by them in accordance with the terms of the tenancy. Pending the suit, the widow died. Defendants 3 and 4 (in the present suit) were the nearest reversioners really entitled to the estate after the death of the widow but one *C*, claiming to be the adopted son of the last male owner, brought himself on record as the legal representative of the widow and was made the second plaintiff. The suit was compromised. *C* promised to pay Rs. 15,000 to the tenants and created in their favour a charge for the amount on the lands leased to them. It was found that *C* was never adopted by the last male owner; nor was he, at the time of the death of the widow, in possession of any of her properties. In a suit for a declaration by the tenants that the charge was binding on defendants 3 and 4, the reversioners entitled to the estate,

Held, that *C* could not be deemed the "legal representative" of the widow and that the decree obtained in a suit wherein the proper legal representatives of the deceased party were not brought on record was not binding on the estate in the hands of the true legal representatives.

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*Appeal No. 10 of 1930. 6th April, 1932.

5. (1930) I. L. R. 54 M. 1: 59 M. L. J. 469 (F.B.).

6. (1932) 63 M. L. J. 73.

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Pukhraj Jeskraj v. *Jamsetji Rustum*, (1926) I. L. R. 50 Bom. 802, followed.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor, dated 14th March, 1929 in O. S. No. 18 of 1927.

T. Kumarasamiah for appellants.

V. Ganapathi for respondents.

The judgment of the Court was delivered by

Sundaram Chetty, J.

Sundaram Chetty, J.—This appeal has been preferred by defendants 3 to 7 and arises out of a suit brought by the plaintiff (first respondent) for a declaratory relief in the Court of the Subordinate Judge of Chittoor. The facts of the case have been set out in the judgment of the Subordinate Judge and a brief reference to them is necessary in order to understand the nature of the dispute in this case. Palayagar Chengama Nayanim Varu (No. 1) was in possession of 62 villages including the three villages mentioned in the plaint schedule B as usufructuary mortgagee under two mortgage deeds, dated the 17th May, 1890 and executed by the Rajah of Karvetnagar. He died in or about 1893 leaving behind him four sons, namely, Vijayappa Nayanim Varu, Govindasami Nayanim Varu and defendants 3 and 4. By means of an award, a partition was effected among these four sons, whereby 14 out of the 62 villages including the three villages mentioned in Schedule B were allotted to the share of Govindasami Nayanim Varu who died in 1897. His widow was Venkatamma. His elder brother Vijayappa Nayanim Varu had two sons, namely Chengama Naidu (No. 2) and the present second defendant. Defendants 5 to 7 are the sons of the 4th defendant. According to the plaintiff's case, Chengama Naidu (No. 2) was the adopted son of Govindasami Nayanim Varu. The present first defendant is the minor son of Chengama Naidu (No. 2). Subsequent to the death of Govindasami Nayanim Varu, his estate became a veritable apple of discord and was the subject-matter of several suits in a long series of litigation. Venkatamma denied the truth and validity of the adoption of Chengama Naidu (No. 2) which was set up by his natural father Vijayappa. The disputes between them were referred to the arbitration of one Krishnamachariar, a Pleader of Tirupati, who passed an award on the 5th January, 1898 (Ex. E). Curiously enough,

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this arbitrator purporting to act on a consent statement given by the parties effected a sort of division between them, without deciding the question of adoption one way or the other. He divided the properties between Chengama Naidu (No. 2) and the widow Venkatamma in the proportion of 3: 1. It is under this award that Venkatamma got the three villages mentioned in Sch. B with absolute rights, whereas, the properties allotted to Chengama Naidu (No. 2) were subject to a defeasance clause to the effect, that, if Venkatamma should beget a male child, he should be divested of the properties given to him under the award. The dispute did not end with this award, but it proved to be the beginning of further disputes. Venkatamma filed O. S. No. 21 of 1900 on the file of the Sub-Court of Chittoor for a declaration that the award is void and that the alleged adoption is neither true in fact nor valid in law. To this suit Vijayappa and his son Chengama Naidu (No. 2) the alleged adopted son and also the present defendants 3 and 4 were parties. (Ex. III.) In the written statement filed by defendants 3 and 4 they denied the truth and the validity of the alleged adoption, questioned the award as being a fraudulent one and also set up an oral will by the late Govindasami Nayanim Varu, whereby he bequeathed all his properties in their favour to be divided equally between them. (Ex. IV.) That suit ended in a *rasi* and was dismissed. Subsequently, the present 4th defendant filed O. S. No. 16 of 1905 in the District Court of North Arcot for the recovery of Govindasami's estate on the strength of the nuncupative will alleged to have been left by him. He also sought for a declaration that the alleged adoption of Chengama Naidu (No. 2) is neither true nor valid. Vijayappa and the alleged adopted son were defendants 1 and 2 in that suit. The present 3rd defendant was also the 3rd defendant, and Venkatamma was the 4th defendant and her brother was the 5th defendant in that suit. It would appear that a decree was passed in that suit declaring the adoption of Chengama null and void, but subsequently the decree was set aside and the suit was restored to file. It was numbered as O S. No. 26 of 1908 on the file of the District Court of North Arcot. Eventually, it ended in a razinama decree on the 31st July, 1909 (Exs. VII and VIII). The compromise was between the plaintiff in that suit and defendants 1, 2 and 3 therein. Venkatamma and her brother

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were no parties to that compromise and they were exonerated from the suit. Under this razinama, one of the 14 villages above referred to, namely, Nandimangalam, was allotted to Chengama Naidu (No. 2) who was the 2nd defendant therein with the burden of paying one-third of the debts due by the deceased Govindasami and the other properties should be taken by the plaintiff and the 3rd defendant therein, (the present defendants 3 and 4) in equal shares with the corresponding liability of paying two-thirds share of the debts due by the deceased. This razinama was entered into without deciding the status of Chengama Naidu in either way but leaving that question completely open. As Venkatamma was exonerated from the suit with costs she was not bound by this compromise. The right which she acquired to the three villages as per the award referred to above remained unaffected by the razinama decree which was passed on the 31st of July, 1909. There is no doubt that defendants 3 and 4 who survived the widow Venkatamma would be entitled to the estate of Govindasami as the nearest reversioners, if the alleged adoption of Chengama Naidu (No. 2) be not true and valid. It is pretty clear that, though the question relating to this adoption was raised in ever so many proceedings, somehow the decision of this question was shelved and some arrangement with respect to the properties in dispute in those proceedings were entered into as a result of compromises, leaving the question relating to the adoption in a nebulous condition.

While matters stood thus, Venkatamma was dealing with the three villages given to her under the award by creating mortgages over the same and also leased them to the present plaintiff's father on the 27th March, 1907, for a period of 20 years fixing the annual rent at Rs. 550. It is alleged in para. 8 of the plaint that under the terms of the lease deed the lessee could appropriate the expenses incurred by him in connection with the litigation concerning the villages out of the rents and profits thereof. During the continuance of the lease, Venkatamma filed O. S. No. 34 of 1918 on the file of the Sub-Court, Chittoor, against the present plaintiff and his brothers for the recovery of arrears of rent, namely, Rs. 3,863-12-0. In the written statement filed by the defendants therein, they pleaded that a sum of Rs. 16,000 was due to them on account of the expenses incurred by them on behalf of Venkatamma in

conducting the litigation relating to those villages. During the pendency of that suit, Venkatamma died and Chengama Naidu (No. 2) brought himself on record as her legal representative and was made the second plaintiff. The suit was subsequently transferred to the Additional Sub-Court, Chittoor and numbered as O. S. No. 26 of 1920. A razinama was eventually put in on the 17th March, 1920 and was recorded by the Court (*vide* Ex. G). Under this razinama, Chengama Naidu (No. 2), the second plaintiff therein, agreed to pay to the defendants therein a sum of Rs. 15,000 together with interest till payment and further created a charge for the realisation of this sum over the three villages (mentioned in the present B schedule), which formed the subject-matter of the lease granted by Venkatamma. It is on the strength of this razinama that the present plaintiff, who says that the amount due under this razi decree was allotted to him in a partition between him and his brothers, has filed this suit for a declaration.

The usufructuary mortgage right in the aforesaid 62 villages possessed by the family of Palayagar Chengama Nayanim Varu (No. 1) is now represented by the amount deposited in the Sub-Court, Chittoor, in pursuance of a redemption decree passed in O. S. No. 31 of 1919 in favour of the Mahant of Tirupati who filed that suit for redemption, as he became the purchaser of the equity of redemption in those 62 villages in execution of a decree obtained against the Raja of Karvetnagar. Out of the proportionate amount due to Govindasami Nayanim Varu in respect of his *othi* right in the fourteen villages allotted to his share in the family partition, a certain amount would be payable to the owner of the *othi* right in the three villages mentioned in the B schedule by apportionment, and what the present plaintiff wants in this suit is a declaration of his right to receive that amount by virtue of the razinama decree in O. S. No. 26 of 1920, whereby a charge is created in his favour over the *othi* right in those three villages. This claim is opposed by defendants 3 and 4 who state that Chengama Naidu (No. 2) was never adopted by Govindasami and the alleged adoption is also invalid in law. They further contend that on the death of Venkatamma they became entitled to the estate of her husband Govindasami as the nearest reversioners. They attack the razinama in O. S. No. 26 of 1920 as collusive and fraudulent and contend that they are in no way

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bound by that razinama and the debt mentioned in that razinama is neither true nor binding upon them as reversioners to the estate.

Plaintiff's claim to enforce the charge created under the razinama in O. S. No..26 of 1920 as against the *othi* right held by the deceased Govindasami in the three villages now in question is mainly based on the case set up in the plaint, namely, that Chengama Naidu (No. 2) who entered into that razinama as the legal representative of Venkatamma, was competent to do so as he was the validly adopted son of Govindasami. The truth and validity of his adoption having been denied by the reversioners, namely, the present defendants 3 and 4, this question was made the subject of the first issue. The learned Subordinate Judge has found that issue in the negative. As observed by him in paragraph 21 of his judgment, the direct evidence about the alleged adoption is so meagre and worthless that no reliance can be placed upon it. He has discussed the circumstances connected with this point, and in the face of the improbabilities and suspicious features connected with the story of adoption, it must be held that the finding of the Lower Court is the only possible conclusion upon the evidence. No serious attempt has been made before us by the learned advocate for the plaintiff (first respondent) to challenge the correctness of that finding. He had to concede the utter inadequacy of the proof adduced in support of the alleged adoption, but what he tried to do was to persuade us to hold that defendants 3 and 4 are in some way estopped from disputing the truth and validity of the adoption. In the first place, it must be observed that no such case of estoppel has been set up in the plaint. If the plaintiff really wanted to rely upon an estoppel, either as a rule of evidence or as part of the substantive law, which would preclude defendants 3 and 4 from disputing the adoption in the present case, he must have set up such a plea specifically in the plaint making the necessary averments for sustaining such a plea. Such a specific plea is conspicuous by its absence in the plaint, nor was any issue taken on this point in the trial Court. The adoption on which alone the plaintiff based his claim in the plaint not having been made out, we have to hold that Chengama Naidu (No. 2), who intervened in O. S. No. 26 of 1920 after the death of Venkatamma (the plaintiff therein) as her legal

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representative, was not competent to represent the estate, and consequently the razinama entered into by him with the defendants therein, whereby a charge was created by him for a certain amount over the properties appertaining to the estate is invalid and unenforcible against the actual heirs who became entitled to the estate on the death of Venkatamma, namely, the present defendants 3 and 4.

It is, however, argued on behalf of the 1st respondent that Chengama Naidu (No. 2) could at least be deemed to be a legal representative within the definition given in S. 2 (11) of the Civil Procedure Code, if it could be shown that he was an intermeddler with the estate of the deceased by getting into possession of some portion thereof. The three villages in question having been leased out by Venkatamma to the father of the present plaintiff, they were not in the possession of Chengama Naidu (No. 2) when he brought himself on record in O. S. No. 26 of 1920 after the death of Venkatamma. It is not clearly shown that he was in possession of any other property appertaining to the estate of Govindasami about that time, in order to make him a legal representative in the sense of an intermeddler with the estate. Here again, an attempt has been made to invoke for aid the plea of estoppel in order to prevent defendants 3 and 4 from disputing the status of a legal representative to Chengama Naidu (No. 2) in O. S. No. 26 of 1920. This contention is based upon the facts relating to certain proceedings carried on after the death of Govindasami. One Mari Subbaraya Chetti filed O. S. No. 37 of 1909 on the file of the District Court of North Arcot to recover a sum of money due on a mortgage executed by Vijayappa as guardian of Chengama Naidu (No. 2), the alleged adopted son of Govindasami. The widow Venkatamma and also the present defendants 3 and 4 were made parties to that suit. These defendants denied the adoption in their written statement. However, the suit ended in a compromise (*vide* Exs. D and D-1). At about that time the will suit above referred to, namely, O. S. No. 26 of 1908 filed by the 4th defendant, was pending. By virtue of the aforesaid compromise, the mortgagee was allowed to have a decree in his favour for the amount claimed by him irrespective of any decree that may be passed in the will suit. As pointed out by the learned Subordinate Judge, the trend of the razinama Ex. D-1 is that, irrespective of any finding as to the will or

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adoption that may be given in O. S. No. 26 of 1908, the mortgagee could recover the amount due to him. This decree was allowed to be passed in that manner without having the effect of an admission of the adoption by defendants 3 and 4. Similarly, in the subsequent compromise entered into in O. S. No. 26 of 1908 (*vide* Ex. VIII) there was no reference to the adoption at all and in fact it was neither affirmed nor negatived. A decree for money was obtained by one Chandra Veerasami Naidu against the estate of Govindasami. That decree was transferred to Messrs. P. Orr & Sons. The latter executed the decree against Venkatamma (the widow) and Chengama Naidu (No. 2). The present defendants 3 and 4 were not made parties to the execution proceedings. It would appear that the present 3rd defendant took a transfer of that decree in 1914 and paid off the money due to Messrs. P. Orr & Sons. It is argued that by such conduct defendants 3 and 4 must be deemed to have recognised Chengama Naidu at least as a joint legal representative with Venkatamma in respect of the estate of Govindasami. It is significant that in the aforesaid two proceedings execution was taken out against the widow and Chengama Naidu (No. 2). If the latter was really treated as the adopted son of Govindasami, there was no need to implead the widow. If there was no adoption, the widow would be the proper and sole legal representative. However, as the adoption was being set up though that question was never allowed to be decided one way or the other in any of the proceedings, the creditor who was interested in the recovery of the money due to him under the decree chose to implead both the widow and the alleged adopted son by way of abundant caution. There is hardly any doubt that the present defendants 3 and 4 were throughout denying the truth and the validity of the alleged adoption of Chengama Naidu (No. 2) and their objection was so constant and persistent that the Court had to order the deletion of the description of Chengama Naidu as the adopted son in some transfer deeds (*vide* Ex. I). In O. S. No. 39 of 1922 on the file of the Sub-Court of Chittoor, which was filed by B. Kuppuswami Reddi against the present first defendant and some others including the present defendants 3 and 4, the same questions were raised as would appear from the judgment in that suit (*vide* Ex. XII), which was given on the 18th November, 1924. The alleged adoption of Chengama Naidu (No. 2) was

found to be neither true nor valid and it was held that Venkatamma had no absolute rights in the three villages in question. In this tangled mass of proceedings, it is impossible to draw any reasonable inference, that the present defendants 3 and 4 have, by any declaration or conduct, intentionally caused or permitted the present plaintiff to believe that Chengama Naidu (No. 2) was either the adopted son of Govindasami or his proper legal representative. In no proceeding to which the present plaintiff was a party could he show that anything was done by defendants 3 and 4 so as to create an estoppel in his favour. That being so, we are clearly of opinion that not only was Chengama Naidu (No. 2) not the adopted son of Govindasami but he was also not the proper legal representative of Venkatamma in O. S. No. 26 of 1920. Even assuming that Venkatamma was absolutely entitled to the three villages mentioned in the B Schedule which formed the subject of the lease granted by her to the present plaintiff's father, we fail to see how Chengama Naidu (No. 2), if he was not the adopted son, could be her legal representative for the recovery of the money claimed in O. S. No. 26 of 1920 or for creating a charge over her properties for any amount alleged to be due by her. The present defendants 3 and 4 either as reversioners to the estate of Govindasami or as heirs to Venkatamma could not be bound by the razinama filed in O. S. No. 26 of 1920 to which they were no parties. The debt mentioned in that razinama is impugned by them to be untrue and the razinama itself is attacked as collusive and fraudulent. That being so, the present plaintiff, who seeks to enforce the terms of that razinama as against defendants 3 and 4, should prove the truth and the binding character of the debt therein mentioned by adducing the necessary evidence. The recital in the razinama cannot be deemed to be proof of the debt or its binding character as against persons who were no parties to it. No independent proof has been adduced in this case. If Venkatamma herself was a party to that compromise and if the villages in question were her absolute property, it can be said that her heirs should be bound by that compromise and should take her estate subject to the encumbrances created by her. That is not the case here. What right had Chengama Naidu (No. 2) to interpose in her suit as her legal representative and to create a charge or an encumbrance over the villages which belonged to her? The answer to this question must be in the negative. The principle

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that a decree passed in a suit wherein the true legal representatives of a deceased party were not brought on record would not be binding on the estate of the deceased party in the hands of the true legal representatives has been clearly stated in a decision of the Bombay High Court in *Pukhraj Jeshraj* v. *Jamsetji Rustum.*1 This question has been discussed at some length by Marten, C. J. That learned Judge has observed that, in view of the altered wording of O. 22, R. 4 of the Civil Procedure Code, it would not be sufficient for an applicant to allege that a particular person is the legal representative of a deceased defendant to enable a decree to be passed which should be valid against the true heir, although that heir is not a party to the suit. If a plaintiff who seeks to enforce a debt owing by the deceased adds wrong persons as legal representatives and obtains a decree, such a decree, even in the absence of fraud, will not be binding against the true representatives or heirs of the deceased. This principle clearly governs the present case. The learned Subordinate Judge has failed to consider the vital questions in this case which are in a narrow compass, though he has discussed at length various subsidiary matters. From what he has stated in paragraph 24 of his judgment it seems to us that he took it for granted that the razinama in question should be binding on defendants 3 and 4, if an outsider like the present plaintiff *bona fide* believed Chengama Naidu to be the legal representative of Govindasami when he entered into it. As we have already pointed out there is no estoppel alleged in the plaint against defendants 3 and 4, nor is it made out in the evidence in respect of the razinama in question. Even assuming that Chengama Naidu (No. 2) was believed to be a legal representative, is it not necessary for the plaintiff to prove the truth and the binding character of the debt specified in the razinama so as to enforce it against the true reversioners or heirs? The need for such proof has been entirely overlooked by the learned Subordinate Judge. We cannot, therefore, accept his finding on the second issue. We are clearly of opinion that the plaintiff has failed to make out that the razinama decree in O. S. No. 26 of 1920 relates to a true debt binding upon the reversioners to the estate of Govindasami or the heirs of Venkatamma. Consequently, the plaintiff is not entitled in this suit to any declaration on

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1. (1926) I. L. R. 50 Bom. 802.

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the strength of that razinama decree as against the reversioners or heirs.

In the result. the plaintiff's claim for a declaration in respect of the amount standing to the credit of the mortgagees in O. S. No. 31 of 1919 on the file of the Sub-Court, Chittoor, should fail, and this appeal is allowed with costs payable by the plaintiff—first respondent. He should pay the costs of defendants 3, 4 and 10 in the Lower Court and bear his own costs. The other defendants will bear their own costs.

S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Nagendra Nath Dey and another .. *Appellants**

v.

Suresh Chandra Dey and others .. *Respondents.*

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Indian Limitation Act (IX of 1908), Art. 182, clause 2—"Where there has been an appeal"—Appeal dismissed as being irregular and incompetent—Limitation enlarged even as against judgment-debtors who were not parties to the appeal.

Under the Limitation Act, Art. 182, clause 2, "where there has been an appeal", time for execution of the decree runs from the date of the decree of the appellate court. The words of the Article are plain and without any qualification either as to the character of the appeal or as to the parties to it.

Held, therefore, that where an appeal, irregular in form and insufficiently stamped, was dismissed both on the ground of irregularity and upon the merits, that it was nevertheless an "appeal" within the meaning of Art. 182, clause 2, and though the judgment-debtors against whom execution was now sought were not parties to the appeal, time only ran against the decree-holders from the date of the appellate court's decree dismissing the appeal.

Equitable considerations are out of place in the construction of the statute of limitation, and the strict grammatical meaning of the words must be given effect to.

Judgment of the High Court, Calcutta, reversed.

Appeal No. 84 of 1928 from a judgment and decree, dated the 16th February, 1926, of the High Court, Calcutta, reversing a judgment and order, dated the 4th August, 1924, of the Subordinate Judge of Hooghly.

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*P. C. Appeal No. 84 of 1928. 21st April, 1932.
Bengal Appeal No. 16 of 1926.

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The main question for consideration on the appeal was whether the application of the decree-holders-appellants made on the 3rd October, 1923, for the execution of a decree was barred by limitation. That depended upon whether time was taken as having run from the date of the decree of the Subordinate Judge, dated the 24th June, 1920, or from the date of the decision of the subsequent appeal, which was decided by the High Court on the 24th August, 1922. The High Court held, applying the ruling in *Christiana Sens Law* v. *Benarashi Proshad Chowdhury*[1] that as the appeal did not imperil the whole decree, the *terminus a quo* was the former date and that the application was consequently barred by Art. 182 of the Limitation Act.

Against the decree of the High Court dismissing the application for execution as time-barred, the decree-holders appealed to His Majesty in Council. The appeal came on for hearing on the 16th and 17th April, 1931, before a Board composed of Lords Russell and Macmillan and Sir Dinshah Mulla, and was re-argued before a larger Board (Lord Blanesburgh, Lord Tomlin, Lord Russell, Sir George Lowndes and Sir Dinshah Mulla) on the 25th and 26th February, 1932.

De Gruyther, K.C. (with *Jinnah*) for appellants.—The words of Art. 182, cl. 2 are quite plain and without any restriction whatever. There having been an appeal, it was unnecessary to enquire whether the appeal was against the whole or only a portion of the decree, or whether the whole decree was or might have been imperilled by the appeal. When there is *any* appeal by *any* party, it suffices to save limitation under cl. 2 of the article: *Abdul Rahiman* v. *Maidin Saiba*,[1-a] *Shivram* v. *Sakharam*,[2] *Viraraghava Iyengar* v. *Ponnammal*,[3] *Krishnama Chariar* v. *Mangammal*,[4] *Gopal Chunder* v. *Gosain Das*,[5] *Satish Chandra* v. *Girish Chandra*,[6] *Dewan Abdul Alim* v. *Abdul Hakam*[7] and *Sonar Singh* v. *Mt. Premdei*.[8]

We also rely on the minority judgment of the Full Bench in *Mashiat-un-Nissa* v. *Rani*[9] which has been adopted in all the recent decisions.

(Their Lordships observed that the present respondents were not made parties to the previous appeal, and the question was, whether, under these circumstances, limitation could be enlarged as against them.)

It is not necessary, in order that the extended period allowed by cl. 2 may apply against a particular party, that he must have been a party to the appeal.

Narasimham and *Subba Rao* for respondents.—"Appeal" in cl. 2 of Art. 182 means an appeal of such a nature that the

1. (1914) 19 C. W. N. 287. 1-a. (1896) I. L. R. 22 Bom. 500.
2. (1908) I.L.R. 33 Bom. 39. 3. (1899) I.L.R. 23 M. 60: 9 M.L J. 284.
4. (1902) I. L. R. 26 M. 91 (F.B.).
5. (1898) I. L. R. 25 Cal. 594 (F.B.). 6. (1920) I. L. R. 47 Cal. 813.
7. (1926) I. L. R. 53 Cal. 901. 8. (1924) I. L. R. 3 Pat. 327.
9. (1889) I. L. R. 13 A. 1 (F. B.).

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result of it is likely to affect the decree: *Mashiat-un-Nissa* v. *Rani*[9] (majority judgment) and *Christiana Sens Law* v. *Benarashi Proshad Chowdhury*,[1] which was approved in *Lokenath Singh* v. *Guju Singh*.[10] The appeal must "imperil" the whole decree. The present respondents were not parties to the appeal and could not in any event be affected by the result thereof.

21st April, 1932. The judgment of their Lordships was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This appeal raises a question as to the construction of Article 182 of Schedule I of the Indian Limitation Act, 1908.

In a suit brought many years ago for partition of certain properties held jointly by the parties to this appeal and their predecessors, a receiver was appointed with power to raise a loan on the security of a mortgage of the properties. The receiver borrowed Rs. 18,000 from some of the co-sharers, and on the 10th July, 1894, he executed a mortgage of the properties in their favour. Amongst the mortgagees were Nagendra Nath Dey and Pulin Behari Dey, who are the appellants before this Board, and Madan Mohan and his son, who are respondents Nos. 24 and 27 respectively. The position at that date was that some of the co-sharers were mortgagees and all the co-sharers were mortgagors.

In 1907, after the shares of the several co-sharers in the partition suit had been allotted to them and the receiver discharged, Madan Mohan and his son instituted the suit out of which the present appeal arises in the Court of the Subordinate Judge of Hooghly to enforce the mortgage. In this suit Madan Mohan claimed that the appellants (defendants Nos. 11 and 12) had assigned their interest in the mortgage to him. The Subordinate Judge upheld his claim, and after taking accounts between the parties, passed a preliminary mortgage decree declaring *inter alia* the liability of the appellants to pay a sum of Rs. 4,467 which they accordingly brought into Court.

On appeal to the High Court at Calcutta a compromise was effected between the parties, and on the 10th June, 1913, a preliminary decree in supersession of the decree of the Subordinate Judge was passed by the High Court in terms of the compromise.

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1. (1914) 19 C. W. N. 287.
9. (1889) I. L. R. 13 A. 1 (F. B.). 10. (1915) 20 C. W. N. 178.

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Under this decree Madan Mohan's claim against the appellants was disregarded, and the appellants were shown as mortgage-creditors for Rs. 14,615-15-3. The appellants thereupon applied to the Subordinate Judge for the withdrawal of the Rs. 4,467. Madan Mohan opposed their application, reasserting his former claim, but his contention was overruled, and the appellants were allowed to withdraw their deposit. Madan Mohan appealed to the High Court, but his appeal was dismissed.

In the preliminary decree as passed by the High Court the co-sharers were ranged into two groups, one of decree-holders consisting of six sets of co-sharers, and the other of judgment-debtors consisting of eight sets of co-sharers. After the date of the decree two out of the eight judgment-debtors paid the amount due from them under the decree. The rest did not pay, and on the 4th June, 1916, Madan Mohan applied to the Subordinate Judge for a final mortgage decree. In his application he again claimed that the appellants had assigned their interest in the mortgage to him, and prayed that an order should be made to that effect. On the 24th June, 1920, the Subordinate Judge delivered his judgment, disallowing Madan Mohan's claim, and a final decree was passed for the sale of the mortgaged properties that had come to the share of the remaining six judgment-debtors. The decree was drawn up on the 2nd August, 1920, but properly dated as of the 24th June.[1] It contained a declaration, in conformity with the judgment, that the appellants were entitled to payment of the above-mentioned sum of Rs. 14,615-15-3 out of the proceeds of the sale of the properties.

On the 27th August, 1920, Madan Mohan presented an application to the High Court purporting to be an appeal from the "order" of the Subordinate Judge of the 24th June, 1920, and alleging, what was clearly untrue, that no decree had been drawn up. His objection was only to the decision against him in respect of the assignment, and he joined as parties to the appeal only the other decree-holders and not the judgment-debtors.

The appeal, though irregular in form as not being an appeal against the decree of the Subordinate Judge, and being

1. *Vide* Order 20, Rule 7, Civil Procedure Code.—K.J.R.

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insufficiently stamped for this purpose, was admitted and heard in due course by Woodroffe and Suhrawardy, JJ. Objection was taken to the form of the appeal; Madan Mohan asked to amend but this was refused. In the result, the appeal was dismissed both on the ground of irregularity and upon the merits, and the dismissal was embodied in a decree of the High Court, dated the 24th August, 1922.

It is upon the effect of this appeal that the decision of the question under Article 182 of the Limitation Act now before the Board depends.

On the 3rd October, 1923, the appellants presented an application to the Subordinate Judge for execution by sale of the mortgaged properties. It was opposed by some of the judgment-debtors, the present respondents Nos. 1 to 4, on the ground that it was barred by Article 182. The material portion of that Article is in these terms:—

Description of application.	Period of limitation	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years ..	1. The date of the decree or order; or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court.

If the three years are to be calculated, as the respondents contend, from the date of the decree of the Subordinate Judge, viz., the 24th June, 1920, the application was manifestly out of time; it was within time if the critical date is that of the decree of the High Court of the 24th August, 1922, and the decision of this question depends on whether Madan Mohan's appeal which was dismissed on the latter date was an appeal within the meaning of the second clause in the third column of the article cited above. The Subordinate Judge held that it was, and that the application was in time; the judgment-debtor-respondents appealed, and the High Court took the opposite view, and dismissed the application of the appellants.

The dismissal is supported upon three grounds, namely, (1) that Madan Mohan's application of the 27th August, 1920 (hereinafter for convenience referred to as the 1920 appeal), was by reason of its irregularity not an appeal at all, but merely

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an abortive attempt to appeal; (2) that an appeal in order to save limitation under clause 2 of the article must be one to which the persons affected, *i.e.*, in the present case the judgment-debtors, were parties; and (3) that it must also be one in which the whole decree was imperilled.

In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it.

The second and third contentions have been the subject of much difference of opinion in India. In *Mashiat-un-Nissa* v. *Rani*[1] three of the Judges in the Full Court took one view, and two the other. In *Gopal Chunder Manna* v. *Gosain Das Kalay*[2] a Calcutta Full Bench followed the Allahabad minority, though drawing a distinction between cases of joint and of several decrees. Subsequently further differences of opinion manifested themselves even in the Calcutta Court; see *Christiana Sens Law* v. *Benarashi Proshad Chowdhury*[3] (upon which the judgment of the High Court in the present case was based); and *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty*[4] and *Dewan Abdul Alim* v. *Abdul Hakam*[5] in both which cases the opposite view seems to have prevailed. In the Courts of Madras, Bombay and Patna, the view which was taken by the minority in the Allahabad case, and which favours the present appellants, has ultimately prevailed.

Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: "where there has been an appeal," time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal

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1. (1889) I.L.R. 13 All. 1 (F.B.). 2. (1898) I.L.R. 25 Cal. 594 (F.B.).
3. (1914) 19 C. W. N. 287. 4. (1920) I. L. R. 47 Cal. 813.
5. (1926) I. L. R. 53 Cal. 901.

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or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of the 24th June, 1920, time only ran against the appellants from the 24th August, 1922, the date of the appellate Court's decree. They are therefore in agreement upon this point with the Subordinate Judge, and they think that the order passed by him on the 4th August, 1924, was right.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 16th February, 1926, should be set aside, and the order of the Subordinate Judge, dated the 4th August, 1924, restored. The respondents Nos. 1 to 4 must pay the cost of the appellants in the High Court and before this Board.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondents: *Chapman, Walker and Shephard.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Sardar Nisar Ali Khan .. *Appellant**

v.

K. B. Sardar Mohammad Ali Khan .. *Respondent.*

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Nisar Ali Khan *v.* Mohammad Ali Khan.

Will (Shiah Muhammadans)—Construction—Will creating succession of three estates—Life-interests or absolute estates—Rule of estoppel—Civil Procedure Code, 1908, *S.* 17*—Jurisdiction of Court—Claim to property as trustee under a waqf and as owner under will—Joinder of causes of action—Permissibility.*

A Shiah Muhammadan, by his will, bequeathed his property to one *F*, "with powers of possession and enjoyment as owner (*wohi ikhtiarat ba qabz-o-tasarruf-e-malikana*)". The will further provided (*inter alia*) that after the lifetime of the said legatee, *M* shall, if alive, be his successor "and shall also have the very same powers as have been bestowed on *F*", and that after the lifetime of the said *M*, "one *H* shall be his successor, provided he be alive".

Held, on the construction of the will as a whole, that the first legatee *F* did not take an absolute interest in the property, and that the dominant intention of the testator was to create a series of three life-estates in succession.

Held, further, that the rule of estoppel laid down in (*inter alia*) *Board* v. *Board*, (1873) L. R. 9 Q. B. 48, that when a person having no title at all went into possession as a limited owner under an invalid will, he was precluded from disputing the title of the remaindermen under the will, had no application to the circumstances of the present case.

A claim to succeed as owner under a will cannot, under S. 17 of the Civil Procedure Code or otherwise, be joined with a claim as trustee under a waqf. The latter is a separate and different cause of action, and the suit in respect thereof can only be entertained in the Court of the district where the property is situate.

Judgment of the Chief Court of Oudh, Appellate Bench, (I.L.R. 5 Luck. 305) affirmed.

Consolidated appeals No. 116 of 1930 from a decree of the Chief Court of Oudh, dated the 22nd April, 1929, which modified a decree passed by a single Judge of that Court, sitting as a Court of Original Jurisdiction, dated the 5th September, 1927.

The dispute giving rise to the litigation deals with the succession to the estates enjoyed by the late Nawab Sir Fateh Ali Khan, a Shiah Muhammadan, who died on the 28th October, 1923, and

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*P. C. Appeal No. 116 of 1930. 21st April, 1932.
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the main question for determination by the Board was as to the true construction of the wills, dated the 15th July, 1896, executed by Nawab Nasir Ali Khan, uncle of the aforesaid Nawab Sir Fateh Ali Khan. The facts of the case and the material terms of the wills are fully set out in the judgment of the Chief Court reported in I.L.R. 5 Luck. 305 and also in the judgment of the Judicial Committee.

De Gruyther, K.C. and *Wallach* for appellant-defendant.—Full proprietary rights were conferred by the wills on the defendant's father, Nawab Sir Fateh Ali Khan, and the subsequent dispositions in the wills were consequently void as being repugnant to the absolute estate thus conferred on the first taker, Fateh Ali Khan. The expression *malik* connotes an absolute estate.

Dunne, K.C. and *Parikh* for respondent-plaintiff.—Taking the will as a whole, only a limited estate was given to Nawab Sir Fateh Ali Khan. The paramount intention of the testator was to create three successive life-estates.

We also submit that under the rule laid down in *Board* v. *Board*[1] and *Dalton* v. *Fitzgerald*[2] the defendant was estopped from denying the plaintiff's title.

De Gruyther, K.C. replied.

21st April, 1932. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—These consolidated appeals are concerned with four properties, one in Oudh and three in the Punjab, of which at his death on the 28th October, 1923, the late Sir Fateh Ali Khan, K.C.I.E., was in possession.

Nisar Ali Khan, who is the appellant in the first appeal and respondent in the second appeal, and is hereinafter called the appellant, is Sir Fateh's son.

Mohammad Ali Khan, who is the respondent in the first appeal and the appellant in the second appeal, and is hereinafter called the respondent, is a first cousin of Sir Fateh, being a son of Sir Fateh's uncle Nawab Nasir Ali Khan, who died on the 19th November, 1896, in possession of the four properties.

On the death of Nawab Nasir, Sir Fateh entered into possession of the estates in question and remained in possession thereafter until his death.

1. (1873) L. R. 9 Q. B. 48. 2. (1897) 1 Ch. 440 and (1897) 2 Ch. 86.

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The following pedigree sufficiently explains the descent of Sir Fateh and the positions in the family of the appellant and respondent respectively:—

NAWAB ALI RAZA KHAN (died the 24th June, 1865).

- Sir Nawazish Ali Khan, K.C.I.E. (died 1890).
  - Hidayat Ali Khan (born about 1878, died 25th October, 1924).
- Nawab Nasir Ali Khan (died 19th November, 1896).
  - Zorah Begam (died 1912).
  - Khan Bahadur Sardar Mohammad Ali Khan, C.S.I. (born about 1870), plaintiff and respondent.
- Nisar Ali Khan (died 1878).
  - Barkat Ali Khan (born 1856, died 11th April, 1912).
    - Ali Mohammad Khan (born 1879, died 14th October, 1926).
  - Sir Fateh Ali Khan, K.C.I.E. (born about 1863, married Zorah Begam, died 28th October, 1923).
    - Nisar Ali Khan (born 1901), defendant and appellant.

The family are Shiah Muhammadans of the Asna Ashari sect governed by the Imamia Law. By family custom women do not inherit.

Sir Fateh's grandfather, Nawab Ali Raza Khan, who died in 1865, was granted for distinguished service to the British Government a property in the Bahraich district of Oudh, described in the lists 1 and 5 attached to the Oudh Estates Act of 1869 as the estate of Nawabganj.

This property, being a Taluqa governed by the Act to which reference has been made, is held for a heritable and transferable estate. If the Taluqdar makes a will in accordance with the Act such will is valid irrespective of any personal law as to testamentary disposition to which he may be otherwise subject. Under S. 8 of the Act intestate succession to the estate is regulated by the rule of primogeniture.

On his death Nawab Ali Raza Khan was succeeded in this property by his eldest son, Sir Nawazish Ali Khan. This property is hereinafter referred to as the Oudh property.

By a deed, dated the 9th May, 1868, Government, after the death of Nawab Ali Raza Khan, made a grant to Sir Nawazish

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Ali Khan of a property in the Lahore district known as and hereinafter called the Rakh Khamba property.

The deed granted the property to Sir Nawazish Ali Khan for life, then to his next brother Nasir Ali Khan for life, and then to his youngest brother Nisar Ali Khan for life. It then provided that on the death of the survivor the estate " shall go and belong to whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate, his heirs and successors . . . and in the event of the said male heirs being unable to agree within a reasonable time then to such one of the lawful heirs of the said Nawab Ali Raza Khan as His Honour the Lieutenant-Governor may consider fittest to succeed to the said estate, his heirs and successors." There were certain conditions attached to the Grant including conditions that the holder of the estate should make due provision for the maintenance of certain persons and that the Local Government might at any time require the holder to set aside from the proceeds of the estate such sum as it thinks necessary for that purpose.

Nisar Ali Khan, the youngest son of Nawab Ali Raza Khan, was the father of Sir Fateh, and died in 1878 in the lifetime of Sir Nawazish.

By a deed, dated the 23rd September, 1871, there was conveyed to Sir Nawazish on a purchase by him from the Government a property in the Punjab called and hereinafter referred to as the Khalikabad property. This property was held for a heritable and transferable estate subject to the ordinary law of inheritance by which the family was governed.

By a deed, dated the 25th April, 1886, Government granted to Sir Nawazish in full proprietary rights a property in Tahsil Lahore known as and hereinafter referred to as the Juliana property. This property was also subject to the ordinary law of inheritance by which the family was governed.

Sir Nawazish died in 1890, and on his death Nawab Nasir Ali Khan succeeded without dispute to all four properties—as to the Rakh Khamba property as the next tenant for life named in the grant, and as to the other three properties under a will of Sir Nawazish presumably in the case of the Khalikabad and Juliana properties with the consent of the heirs, as under the

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appropriate law only one-third of such properties could be disposed of testamentarily without such consent.

On the 1st January, 1892, Nasir Ali Khan was created an hereditary Nawab by a *sanad* granted by the Viceroy. After the death of Nasir Ali Khan Sir Fateh was recognised by the Government as his successor in the Nawabship.

On the 17th June, 1892, Nasir Ali Khan executed a deed of endowment and the Khalikabad property was included in the *wakf*. He named himself as the first trustee and provided that after him "the trusteeship would revert to that person who would be my successor and this office would devolve in future upon other successors in the same manner." On his death Sir Fateh entered into possession of the property as trustee and remained in possession until his death.

On the 15th July, 1896, Nasir Ali Khan made two wills, one relating to the Oudh property and the other relating to the Juliana and Rakh Khamba properties. These wills were, with one exception, to which attention will be directed, identical *mutatis mutandis*.

Both wills were signed by the respondent and his sister, but both Courts below have held that they did not sign as witnesses but to show their assent to the provisions of the will. The will relating to the Oudh property, according to the translation accepted in the Courts below, was as follows:—

"In the name of Allah the most beneficent and the most merciful.

I am Haji Nawab Nasir Ali Khan, son of the late Nawab Ali Raza Khan, may God forgive him, caste Qizilbash, *malik* (owner) and Taluqdar of Nawabganj Aliabad, Bahraich district in the Province of Oudh, at present resident of Lahore—whereas the borrowed life is transitory, wherefor considering the appointment of an executor and my successor one of the necessities and a duty—while in possession of sound senses and stable intellect, without repugnance and compulsion—do hereby affirm and write that whereas the estate comprising Taluqdari Nawabganj Aliabad, parganas Charda and Bhinga, district Bahraich, and also situate in Bahraich city proper, in the province of Oudh along with all property and articles movable and immovable, and all internal and external rights and right of easement, which was given to me by my elder brother the late Sir Nawab Haji Nawazish Ali Khan Sahib, may God forgive him, by means of the registered will, dated 14th February, 1882 A.D. made under S. 11 of Act I of 1869 A.D. and subsequently in 1889 A.D. the said Sir Nawab Sahib in his lifetime having got this very above-mentioned Taluqdari estate, with all rights and interests, mutated in my name made me like himself owner without anyone else's partnership, *bila shirkat ghaire*—accordingly I have been continuously and am still in possession (*qabiz*) and owner (*malik*) of this very Taluqdari estate from the date of mutation till to-day. Now, under S. 11 of Act I of 1869 A.D. I, by means of this will, do hereby appoint Nawab Fateh Ali Khan, son of my late brother Nawab Nisar Ali Khan, may God forgive him, my executor and successor of

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all this Taluqdari estate with all the rights and interests aforesaid and do hereby authorise the legatee that whatever Taluqdari powers over the above-mentioned Ilaqa and over all the properties movable and immovable I the said declarant have, my legatee, to wit, Nawab Fateh Ali Khan, after my lifetime shall have like myself (*misl maire*), the very same powers with powers of possession and enjoyment as owner (*'wohi ikhtiarat ba qabz-o-tasarruf-e-malikana'*) provided he be alive. Similarly after the lifetime of the legatee Nawab Fateh Ali Khan, my son Nawab Mohammad Ali Khan, shall, if alive, be his successor. He shall also have the very same powers as have been bestowed on Nawab Fateh Ali Khan by means of this deed of will. After the lifetime of my son Nawab Mohammad Ali Khan, Nawab Hidayat Ali Khan, son of the late Sir Nawab Haji Nawazish Ali Khan Sahib shall be his successor, provided he be alive. After all these three successors the fit amongst the descendants of the successors shall succeed. The last legatee shall have power to nominate his successor anyone whom he considers fit from amongst the descendants of each of the three successors ; and if the last legatee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsoever they consider fit and superior amongst themselves.

The line of successors shall continue according to this very rule. In the event of disagreement the Government shall have power to appoint as successor anyone amongst the descendants of each of the three successors whom it considers the fittest. And if anyone amongst our family claims maintenance contrary to the wishes of the Taluqdars, to wit, my successors, he shall, in no way, be entitled as of right to get maintenance. The successors shall have power to give or not (?) maintenance in the event of good conduct and obedience. And if anyone of our family or heirs makes any claim of proprietary rights in respect of the said Ilaqa or any movable or immovable property whether in whole or in part, as against the successors, it shall then be invalid and unentertainable. I, therefore, execute this deed of will under S. 11 of Act I of 1869 A.D., so that it may remain a 'Sanad' (documentary proof) and may be of use in case of necessity."

In the will relating to the Punjab properties instead of the phrase "that whatever Taluqdari powers over the above-mentioned Ilaqa and over all the properties movable and immovable I the said declarant have" and the phrase "contrary to the wishes of the Taluqdars to wit my successors" there were substituted respectively the phrase "that whatever powers I, the declarant, have in respect of the said movable and immovable properties" and the phrase "contrary to the wishes of the grantee and owner (*muafidar* and *malik*) to wit my successors."

Nawab Nasir died on the 19th November, 1896, and the *soem* or third day ceremony after his death took place on the morning of the 21st November, 1896. In the afternoon of the same day the *dastarbandi*, or tying of the turban ceremony, took place.

There was at the trial a serious conflict of evidence as to what took place at this afternoon ceremony, it being alleged on the one hand by the appellant that Sir Fateh was then elected to succeed to the Rakh Khamba property in accordance with the

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terms of the grant, and on the other hand by the respondent that Sir Fateh, the respondent, and Sir Nawazish's son, Hidayat Ali Khan, were recognised by the family as successors to all four properties in accordance with the terms of Nawab Nasir's wills.

At any rate Sir Fateh entered into possession of all four properties, but in the case of the Khalikabad property as trustee and remained in possession until his death on the 28th October, 1923.

On the death of Sir Fateh his eldest son, the appellant, took possession of the four properties, and on the 9th December, 1925, the respondent instituted in Oudh the suit out of which these appeals arise.

The trial Judge held that upon the true construction of the wills Sir Fateh took a life-interest only and that after his death the respondent succeeded to the properties which the wills affected either as next tenant for life or as heir of Nawab Nasir. He also held that so far as was necessary for the disposition of the entirety of any property affected by the wills the heirs of Nawab Nasir had assented to the wills. His conclusion therefore was that the respondent had made out his title to the Oudh and Juliana properties.

With regard to the Rakh Khamba property the learned Judge took the view that having regard to the terms of the grant Nawab Nasir had no power of testamentary disposition, that there had been no election of a successor in accordance with the terms of the grant but that Sir Fateh had been recognised by the family as succeeding to this property under the will and that the defendant was estopped from denying that he had so succeeded.

As to the Khalikabad property the learned Judge held that he had jurisdiction (which the appellant questioned) to decide the matter and that the respondent having succeeded to the Rakh Khamba property must be treated as successor of Sir Fateh and therefore trustee of the *waqf*.

The learned Judge, therefore, made a declaration of the respondent's right to possession of all four properties.

On appeal to the Chief Court of Oudh the judgment below was affirmed as to the Oudh and Juliana properties, but reversed as to the Rakh Khamba and Khalikabad properties. As to the Rakh Khamba property the Chief Court took the view that Sir

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Fateh had been selected either by the heirs or by the Government in accordance with the terms of the grant to succeed to the Rakh Khamba property, and therefore that the appellant as his heir was entitled to this property.

As to the Khalikabad property the Court was of opinion that whoever succeeded to the hereditary Nawabship would be entitled to be trustee of the *waqf*, but that as no selection for the Nawabship had been made the respondent could show no title and the suit must fail against the appellant who was in possession. Both parties appealed to His Majesty in Council.

Before their Lordships' Board it was argued by the appellant that the Courts below were wrong with regard to the Oudh and Juliana properties, because the wills of Nawab Nasir upon their true construction conferred a series of absolute interests, and therefore that Sir Fateh took absolutely as the taker of the first absolute interest, all subsequent interests and provisions being repugnant and bad.

It is a matter of difficulty to determine from translations the true effect of testamentary instruments framed in the vernacular by persons with customs and habits of mind differing widely from the customs and habits of mind of testators in this country, and it would be unwise to adhere too rigidly to rules of construction formulated for the interpretation of instruments created in a different environment.

Their Lordships have been referred to a number of decisions of the Board with reference to the word *malik*, and these decisions are in their Lordships' minds in arriving at their conclusions upon the wills in the present case.

Their Lordships are of opinion that there is no substantial difference between the two wills and that it would not be possible to give one a meaning which the other would not bear. The dominant intention of the testator as displayed by each of the wills is in their Lordships' judgment an intention that the property should pass to three persons in succession and thereafter to some one or more persons selected in a specified manner. This intention is inconsistent with the idea of a series of absolute interests and could only be given effect to with such a series if each taker voluntarily denied himself the exercise of all power of alienation, *inter vivos*, and disposed of the property testamentarily to the next taker in accordance with the testator's scheme.

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Without a succession of limited interests, the dominant intention cannot have effect and regarding each will as a whole their Lordships are of opinion that life-interests only are conferred. This view receives additional support from the fact that the gift to each subsequent taker is expressed to be to him if alive or provided he be alive and after the lifetime of the previous taker and that the testator refers to all three named takers as his successors.

The gift in the Oudh will of Taluqdari powers and in the Punjab will of the same powers as the testator had must in their Lordships' opinion be read as a gift of such powers so far as is consistent with the subsequent provisions of the instrument.

The appellant's appeal therefore fails, as upon this construction their Lordships are of opinion that the respondent was entitled on Sir Fateh's death to succeed to the Oudh and Juliana properties as next tenant for life, both Courts below having held that the will was assented to by Nawab Nasir's heirs so far as was necessary to comply with Muhammadan law in regard to the Juliana properties.

Their Lordships express no opinion as to the effects of the wills after the death of the respondent the third tenant for life being already dead.

The respondent on his own appeal seeks to restore the order of the trial Judge in regard to the Rakh Khamba and Khalikabad properties.

With regard to the Rakh Khamba property it is not sufficient for the respondent to displace the title of the appellant who is in possession. He must establish substantively a better title in himself. He sought to do so before their Lordships' Board by alleging some agreement between members of the family either in the life of Nawab Nasir or on his death that effect should be given to the Punjab will in regard to this property. There seems to their Lordships to be three fatal objections to this case, namely, (1) it has not been pleaded or proved, (2) the defendant was not born at the time and would not be bound by any such agreement, and (3) effect could not be given to the agreement at any rate as against the Government as it is inconsistent with the terms of the grant.

He further alleged that there was in the circumstances some estoppel against Sir Fateh which bound the appellant and precluded him from denying that the Punjab will had effect in regard to the Rakh Khamba property.

The following passage occurs in para. 9 of the amended plaint:—

"Nawab Sir Fateh Ali Khan enjoyed full benefits given him by the wills and the deed of *waqf* aforementioned, and it is not now open to the defendant to assert a title inconsistent with the terms of the said deeds."

Except for this passage their Lordships do not find that any case of estoppel was hinted at in the pleadings, but issue No. 12 was settled in the following terms: "Is the defendant estopped from claiming that any portion of the wills of 1896 is invalid?" and the learned trial Judge found that both by acceptance of the wills as a whole and by assertions which led the respondent to suppose that he was the accepted heir, Sir Fateh created an estoppel to the present claim of his son that one portion of the property, namely, the Rakh Khamba property, came to him by some means other than the will on which his original title was based.

Their Lordships are unable to accept the view that the assertions to which the trial Judge refers even if they were sufficient to estop Sir Fateh could create an estoppel against the appellant.

It was, however, said that Sir Fateh in fact went into possession under the wills and that upon the principle of the decisions in *Board* v. *Board*[1] and *Dalton* v. *Fitzgerald*[2] the appellant is estopped from disputing the title of the remaindermen under the wills.

Now the argument proceeds on the basis that there was no selection of Sir Fateh in accordance with the terms of the grant. Obviously if such a selection was proved, that fact would be inconsistent with the allegation that Sir Fateh went into possession under the wills.

Ex hypothesi, therefore, Sir Fateh had no title at all, and although if he went into possession under the wills he might be estopped from denying the remaindermen's title, their Lordships are unable to see upon what principle the appellant entering into possession after his father's death without any title at all because his father had nothing to pass to him can be affected by any estoppel.

1. (1873) L. R. 9 Q.B. 48. 2. (1897) 1 Ch 440 and (1897) 2 Ch. 86.

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In each of the cases cited the entrant into possession under the invalid instrument had acquired a good title from another source and his purchaser or devisee of that good title was not allowed to set it up, because as such purchaser or devisee he was a privy of him who was estopped by having entered under the invalid instrument.

Here on the hypothesis of no selection the appellant takes nothing through his father, and the mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purposes of the rule in *Board* v. *Board*.[1] He can rely on his own possession as a squatter.

It follows therefore in their Lordships' judgment that the respondent's appeal in respect of the Rakh Khamba property must fail, whether he proves or fails to prove that Sir Fateh entered under the wills. If he fails to prove it he has no basis for his plea of estoppel from which alone he seeks to evoke a title for himself. If he does prove it, he cannot in their Lordships' opinion for the reason already indicated support the plea of estoppel against the appellant.

In these circumstances it is unnecessary for disposing of this appeal to determine the issue of fact whether or not there was any selection of Sir Fateh to succeed to the Rakh Khamba property in accordance with the terms of the grant, and this issue will therefore remain open to be adjudicated upon on some future occasion should circumstances so require.

There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the *waqf* he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from those which found the proceedings in respect of the other three properties.

Their Lordships are unable to find any justification for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such justification cannot, in their Lordships' judgment, be found in S. 17 of the Code of Civil Procedure upon which the respondent relied.

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1. (1873) L. R. 9 Q. B. 48.

There were certain *ex parte* applications made by the respondent at an early stage of the suit as the result of which he determined to combine and did in his plaint combine his claims in respect of all four properties in one suit in the Court in Oudh. The appellant in his written statement at once took objection to the jurisdiction so far as the claim in respect of the Khalikabad property was concerned.

There was nothing in what occurred in connection with the respondent's *ex parte* applications to render the appellant's objection to the jurisdiction inadmissible. That objection has been properly considered in the Courts below, and is proper to be adjudicated upon before their Lordships' Board. The objection in their Lordships' judgment succeeds and is fatal to the respondent's appeal in respect of the Khalikabad property.

It becomes therefore unnecessary to consider the true effect of the grant creating the *waqf*, and their Lordships must not be taken as expressing any views upon the conclusions reached on this matter in the Courts below.

A number of minor issues were considered and dealt with in the Courts below but were not debated before their Lordships' Board.

In the result therefore both appeals fail and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

There will be no costs on either side except that, as regards K.B. Sardar Mohammad Ali Khan's petition for the discharge of a receiver, K. B. Sardar Mohammad Ali Khan will pay to Sardar Nisar Ali Khan his costs of that petition as directed by Order in Council of the 23rd July, 1931.

Solicitor for Nisar Ali Khan: *H. S. L. Polak.*

Solicitors for Mohammad Ali Khan: *T. L. Wilson & Co.*

K. J. R. *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Canada.]

PRESENT:—VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD MERRIVALE, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

The King .. *Appellant**

v.

The B. C. Fir and Cedar Lumber Company, Limited .. *Respondents.*

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The King *v.* The B. C. Fir and Cedar Lumber Co., Ltd.

British Columbia Taxation Act (1924), *Ss.* 2, 44 (1) *and* 48 (3)—*Income from business—Moneys received under use and occupancy policies—Liability to assessment—Interpretation of statutes—Interpretation clause—"Include"—Meaning of.*

Moneys received by a company under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under the British Columbia Taxation Act, to be brought into account by them for assessment. The insurance receipt was the product of a revenue payment. It had to be brought into their revenue account for determining the profits available for dividend. As a result of the receipt, the company had secured for themselves a net receipt involving gain, which, though unusual, was not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. In ordinary parlance and within the meaning even of the interpretation clause, it was "income from a business" which had necessarily to be brought into receipt as such in the profit and loss account of the business referred to in S. 48 (3) of the Act.

When in the interpretation clause of a statute, a word is said to "include" things that follow, the word includes, unless the context otherwise requires, not only those things which the clause declares it shall include but such things as the word signifies according to its natural import.

Appeal No. 77 of 1931 from a judgment of the Supreme Court of Canada, dated 13th May, 1931, reversing the judgment of the Court of Appeal of British Columbia, dated 7th October, 1930.

The facts of the case are fully stated in their Lordships' judgment.

Geoffrey Lawrence, K. C. and *Wilfrid Barton* for appellant.

W. N. Tilley, K. C. and *J. W. Scobbell Armstrong* for respondents.

8th March, 1932. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—This, by special leave, is an appeal from a judgment of the Supreme Court of Canada of the

* P. C. Appeal No. 77 of 1931. 8th March, 1932.

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13th May, 1931, whereby, in effect, judgment in favour of the plaintiff-appellant, pronounced at the trial by the Supreme Court of British Columbia and affirmed on the 7th October, 1930, by the Court of Appeal of the same Province, was discharged. The appellant now seeks to have these two earlier judgments restored.

The broad question for decision is whether certain moneys received by the respondents under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under the British Columbia Taxation Act, 1924, to be brought into account by them for assessment to income-tax.

This question has led, in these proceedings, to an acute difference of judicial opinion. The learned Judges of the Supreme Court unanimously favoured a negative answer to the question, and their view had the support of Mr. Justice Martin in the Court of Appeal of the Province. On the other hand, the four remaining learned Judges of that Court, supporting the learned trial Judge, were all in favour of the view that the moneys in question must be brought into account by the respondents for taxation purposes.

The respondents are a company incorporated under the Companies Act of British Columbia. Since 1921 they have been carrying on business at the city of Vancouver as manufacturers of and dealers in lumber and lumber products. On the 21st August, 1923, their plant and premises were destroyed in a conflagration. These subjects were insured against loss and damage by fire under annual policies, taken out or renewed in the previous March with some seventeen insurance companies. The respondents were also insured by the same companies against the further loss or damage they might sustain in the event of their plant either in whole or in part and for a period long or short being shut down or its working suspended in consequence of fire. These policies, the use and occupancy insurances already referred to, were separate from but complementary to the main policies. They insured the respondents in the total sum of $84,000 in respect of loss of "fixed charges" and $60,000 in respect of loss on "net profits". The nature of the liability so assumed by the insuring companies, with the character and quality of the payments made to the respondents in its discharge, is made sufficiently apparent by the definitions

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of the expressions, "fixed charges" and "net profits," contained in the policies themselves. "Fixed charges" are there defined to mean: " All the standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the said plant shall be inoperative." " Net profits " are defined to mean " the net profits that would have accrued had there been no interruption of business caused by fire."

The annual premium upon the use and occupancy insurances amounted to $3,828.29. This premium had, in ordinary course, been brought into the accounts of the respondents as a revenue charge, and it is stated to have been allowed by the taxation authorities as a permissible deduction in the computation of the net income of the respondents for the purpose of income-tax under the Taxation Act. This payment of premium out of revenue and its allowance as a disbursement are circumstances of importance in the case.

The loss payable under the main fire policies was, it would appear, separately adjusted with the Companies, was duly received by the respondents, and as to that receipt, admittedly a receipt on capital account, no question is raised. As to the claims of the respondents under the use and occupancy policies, the respondents and the adjuster of the insuring companies agreed that the period of interruption of the respondents' business was 215 business days, this being the length of time estimated to be required for the rebuilding of the plant, and the loss was adjusted on the following basis:—

Loss of net profits, estimated for $317.23 per day, and allowed at $200 per day ..	$43,000
Payment of fixed charges, estimated and allowed at $234.80 per day ..	$52,427.90
Total ..	$95,427.90

It is not disputed that as between the tax years 1923 and 1924 this sum if assessable to tax at all is properly apportionable as follows:—

1923—113 business days:

Net profits ..	$22,600.00
Fixed charges ..	$27,555.05

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1924—102 business days:

Net profits	.. $20,400.00
Fixed charges	.. $24,872.85

The sum of $95,427.90 having been duly received, the respondents in their income-tax returns to the Province for the year 1923 included the sum of $41,293.20 as an income receipt, and in their return for the year 1924 they included as a similar receipt the sum of $33,706.80. In the result, provincial income-tax for the years 1923 and 1924 was in fact paid in respect of these sums aggregating $75,000 out of the total sum of $95,427.90 received as already stated.

The respondents did not bring into account for either year the balance—$20,427.90. Their view even then was that that sum was exempt from liability to tax for the reason that it represented moneys received from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having in fact taken a less number of days than that estimated for and allowed by the adjusters.

Now, with reference to these matters two things can at once be said. On the one hand, the $75,000 were brought in before any advice was taken, and it is agreed between the parties that the mere fact that income-tax was inadvertently paid by the respondents thereon is not to prejudice them to the extent to which in these proceedings it is not established that these moneys were liable to be brought into charge. On the other hand, it has not been contended by the respondents that any distinction in the matter of liability to tax can really be drawn between the $75,000 in respect of which its existence was originally assumed by them, and the balance of $20,427.90 in respect of which exemption was always claimed.

On the 28th November, 1927, the action out of which this appeal arises was commenced. There was a claim for arrears of personal property tax for interest and for penalties. But it soon emerged that there was no dispute between the parties with reference to the personal property tax. The claim which remained—not, it must be agreed, very clearly alleged—was originally, in effect, one for income-tax, upon the balance figure of $20,427.90, already mentioned. At the trial, however, as a result of preliminary admissions of fact between the parties, it was found that, for special reasons which for the moment their

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Lordships pass by, the accountability of the respondents to income-tax in respect of the receipts representing fixed charges need not be further disputed, and that the real question, effective in result, was confined to the alleged liability of the respondents for income-tax in respect of "the loss of net profits" receipt, and it was agreed that, if it were held that the respondents were liable to income-tax on that receipt, the sum remaining recoverable in the action, after all adjustments, was $3,922.86, any question of liability to penalties being held over. Thus it was that the learned trial Judge who held the respondents to be so accountable, entered judgment for the Crown in the sum stated. Thus also it was that in all the Courts attention has been focussed on this one major issue, and it is with reference thereto alone that the judgments under review have been given.

The question whether this "loss of net profits" receipt is one which must be brought into calculation for the purpose of arriving in each of the tax years in question at the sum for which the respondents are assessable to provincial income-tax must depend upon the provisions, properly construed, of the taxing statute of the Province. But it will be convenient before these provisions are applied to that receipt to ascertain apart from any question as to income-tax its precise place and character in the economy of the respondents' business. And there is, it would appear, little difficulty in ascertaining this.

The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might definitely be brought to a close and acquisition of gain for them definitely ended.

But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken

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acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of reinstatement.

This insurance receipt therefore was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount.

Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and therefore out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would but for the stoppage presumably have been earned.

Finally, the receipt was one of which, as their Lordships think, it can be fairly said that it arose from the business of the respondents. The two English cases of *The Commissioners of Inland Revenue* v. *Newcastle Breweries*[1] and *J. Glikstcn & Son, Limited* v. *Green*[2] are authorities for this proposition. This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves a net receipt involving gain—an unusual mode of deriving gain from the business, it may be agreed, but, as Lord Warrington said in similar circumstances in the *Newcastle Breweries* case[1], not so

1. (1927) 12 T. C. 927 at 947. 2. (1928) 2 K. B. 193: 1929 A. C. 381.

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divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by Sargant, L. J., in *Gliksten's* case[2] it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialised.

This then as applied to the respondents' business is the nature of the receipt with reference to which the inquiry must now be made, whether under the Taxation Act, 1924, it is of a character to be brought into charge.

That Act is very lengthy, it consists of 200 sections, but its provisions relevant to the inquiry in hand are not numerous. Section 2 is an interpretation section. It places a meaning upon 28 expressions used in the statute. In 13 instances the definitions which follow are said to be "included" in the term defined; in 15 instances the term defined is said to "mean" that which follows.

The word "income" is in the former class, and their Lordships cannot doubt that in consequence the word, as used in the statute, includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import. See *Dilworth* v. *Commissioner of Stamps*.[3] By S. 2, unless the context otherwise requires, "income," amongst many other things, "includes" the gross amount "earned, derived, accrued or received from any source whatsoever, the product of capital, labour, industry or skill . . . and includes all income, revenue, rent, interest or profits arising, received, gained, acquired or accrued due from . . . real and personal property, or from money lent, deposited or invested, or from any indebtedness secured by deed, mortgage, contract, agreement or account, or from any venture, business or profession of any kind whatsoever."

"Person" includes corporations.

By Section 4 (1) it is provided that—

"To the extent and in the manner provided in this Act and for the raising of a revenue for provincial purposes—

(a) All property within the Province and all output and income of every person resident in the Province . . . shall be liable to taxation."

Part III of the Act relates to taxation of income, and certain classes of income are made exempt from taxation by S. 42.

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2. (1928) 2 K. B. 193 at 203.

3. (1899) A. C. 99 at 106.

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Section 44 (1) is as follows:—

"The net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exemptions provided in S. 42 . . . and all expenses incurred in the production of that part of his income which is liable to taxation . . and the income-tax thereon payable to the Crown in right of the Dominion . . . but the following shall not in any case be allowed as expenses incurred in the production of income.

* * * * * *

"(*i*) Any loss or expense recoverable under any insurance policy or contract of indemnity.

"48. (1) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand and filed with the Assessor of the assessment district in which the income is liable to taxation. . . .

* * * * * *

"(3) Where the return contains a statement of income derived from any business, the taxpayer shall attach thereto a copy of his certified balance sheet and profit and loss account relating to that business for the period covered by the return.

* * * * * *

"51. The tax on income shall be assessed, levied and paid annually upon the net income of the taxpayer during the last preceding calendar year."

A reference to S. 44 (1) (*i*) and S. 48 (3) shows very clearly why in this case the receipt by the respondents in respect of "fixed charges" disappeared from the discussion. In their accounts for the purpose of arriving at their "net income" the respondents were entitled to the benefit of a deduction for fixed charges as an expense: they were, however, required by S. 44 (1) (*i*) as against these lost fixed charges to bring in the fixed charges insurance receipt. The effect (the account being otherwise in credit) was necessarily to increase by the amount of that receipt the ultimate net income of the respondents.

Leaving therefore that item, the question is whether within the meaning of the Act the insurance receipt in respect of "loss of net profits" was also "income" to be brought into account so as to enter into the calculations for determining the "net income" of the business for income-tax purposes.

In view of the nature and origin of the receipt, as they have traced these, their Lordships have reached the conclusion that within the meaning even of the interpretation clause this receipt was "income from a business" and that in ordinary parlance it was income or gain derived from the business of the respondents which had necessarily to be brought into receipt as such in the profit and loss account of the business referred to in S. 48 (3) of the statute.

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In effect, this was the view taken by the learned trial Judge and by the majority of the Court of Appeal of British Columbia. Mr. Justice Martin's dissenting view, although perhaps less clearly expressed, may be taken to coincide with that of the learned Judges of the Supreme Court, which was that the statute nowhere provides for taxation of moneys paid by way of indemnity for profits not earned but irretrievably lost: that the moneys in question represented insurances placed by the respondents in order to meet the possibility of destruction by fire of its means of earning profits: that that event occurred, with the result that the respondents made no profit out of the property which could be taxed for the period in question: that there were therefore no profits to tax, and, in the absence of clear language authorising such a course, there was no warrant for taxing money substituted for profits by way of indemnity for their loss.

Their Lordships feel that the true question at issue has not in this statement been really dealt with by the learned Judges of the Supreme Court. The real question was whether the insurance moneys in question constituted "income" of the respondents within the meaning of the Taxation Act, and not whether these moneys were "profits" of its business. Moneys which are not strictly "profits" of a business may yet be income of the taxpayer. But even on the question whether the moneys here could properly be described as "profits" the learned Judges do not seem to have referred to the reasoning of the House of Lords in *Glikstem's case, supra,* which would appear to be in conflict with their own.

But however the receipt be described, it is because it is truly "income" of the respondents that it must be brought into charge in their revenue account for the purpose of arriving in respect of the year of charge at the respondents' net income. Whether the whole or any part of it is finally chargeable depends upon the result of the whole annual expenditure and revenue accounts of which it constitutes one item only.

For these reasons their Lordships find themselves in the result in agreement with the learned trial Judge. They are unable to concur in the conclusion of the Supreme Court. They think accordingly that this appeal should be allowed, and the judgment of the Court of Appeal of British Columbia restored.

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This will automatically revive the judgment of the learned trial Judge.

And their Lordships will humbly advise His Majesty accordingly.

The Crown must have its costs before the Supreme Court, but in view of the observations of their Lordships upon this subject made on the application for special leave there will be no costs of this appeal.

Solicitors for appellant : *Gard, Lyell & Co.*

Solicitors for respondents : *White & Leonard.*

S. R. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Achambat Abdurahiman, minor, by his mother Thithachumma and another .. *Appellants** (*Petitioners*)

v.

Kelavarman Puthentheruvil Kizhakkayil Imbichunny (dead) and Gopalan added as L. R. of 1st Respondent (*vide* Order dated 5th March, 1931, on C. M. P. No. 749 of 1931) .. *Respondents* (*Counter-petitioner and his L. Rs.*).

Abdurahiman v. Imbichunny.

Appeal—Application for review—Dismissal after notice—Appeal from original decree—Competency of—Civil Procedure Code (V of 1908), O. 47, R. 7.

Where, on an application for review of an order, the Court after notice to the opposite party dismissed it on the ground that "the mistakes pointed out by the petitioners are unimportant and cannot in any way modify the conclusion I have arrived at in that order. The petition is rejected,"

Held, that the order in question did not have the effect of re-opening the whole matter, that the mere fact that the merits were considered did not have the effect of superseding the former decree and that an appeal from the former decree was competent.

Gour v. *Nilmadhab*, (1922) 36 C.L.J. 484, applied

Vadilal v. *Fulchand*, (1905) I. L. R. 30 Bom. 56, referred to.

Appeal against the order of the Court of the Subordinate Judge of Ottapalam in A. S. No. 26 of 1929 (A. S. No. 55 of 1929, District Court, Calicut) preferred against the order of the Court of the District Munsif of Parpanangadi in E. A. No. 166 of 1928 in O. S. No. 782 of 1916.

*C. M. S. A. No. 107 of 1930. 25th February, 1932.

Abdu-rahiman *v.* Imbichunny.

N. R. Sesha Aiyar for appellants.

K. Kuttikrishna Menon for respondents.

The Court delivered the following

JUDGMENT.—This appeal arises in the following way. In execution of the decree in O. S. No. 782 of 1916 on the file of the District Munsif's Court of Parpanangadi the suit properties were attached. A petition against such attachment was put in —E. A. No. 166 of 1928—and the Court found that the petitioners had no right to the property and passed an order dismissing the petition on 10th December, 1928. Against that order an appeal was filed in the District Court which was transferred to the Subordinate Judge's Court of Ottapalam. After the passing of the order against which the appeal was filed, the appellants filed E. A. No. 1670 of 1928 in the District Munsif's Court of Parpanangadi for a review of the order; and on that review application notice was issued to the respondent to appear by pleader and file objections, and the Court passed its order on 18th January, 1929, rejecting the petition. When the appeal against the order in E. A. No. 166 of 1928 came on for hearing, a preliminary objection was raised that the appeal was not competent and the Subordinate Judge, holding that it was not competent, dismissed it. Against this order the present appeal has been filed.

The matter is one of considerable difficulty. The learned Subordinate Judge held that, though the effect of the order, dated 18th January, 1929, on the review application was to repeat the former decree, nevertheless on the authority of *Vadilal* v. *Fulchand*[1] the whole matter having been re-opened, there was a fresh decree and therefore the appeal against the order of 10th December, 1928, was not competent. The decision in *Vadilal* v. *Fulchand*[1] and *Gour* v. *Nihnadhab*[2] lay down clearly the procedure which should be followed in regard to an application for review. As stated in the latter case, a review proceeding commences ordinarily with an *ex parte* application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged, and the hearing of this rule may involve to some extent an investigation into the merits. If the

1. (1905) I. L. R. 30 Bom. 56 at 58. 2. (1922) 36 C. L. J. 484.

rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of a former decree or in some variation of it. Though, in one aspect, the result is the same whether the rule is discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. The real difficulty in the present case is to determine whether the order was passed in the second or third stage. It seems to me clear that the Court which passed it did not realise that there were three stages and we have, therefore, to gather from what has happened at what stage the final order was passed. It is stated at page 487 in *Gour* v. *Nilmadhab*[2] that

> "The failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrassment of litigants in many instances."

In that case also it was stated that the various stages through which an application for review may pass were not clearly appreciated by the lower appellate Court. In that case, however, the decree was reviewed, so that the present difficulty did not really arise. The appellants rely very strongly on this sentence in the order "The petition is rejected". The other side relies on the order to show that the whole matter was gone into and reliance is specially placed on the words "The mistakes pointed out by the petitioners are quite unimportant and cannot in any way modify the conclusion I have arrived at in that order". It seems to me that the facts in this case are closely similar to those in *Vadilal* v. *Fulchand*[1]. But though the lower appellate Court has relied on this case for its decision, I am inclined to think that it supports the appellants. It is stated there at page 57:

> "A *rule nisi* was issued requiring Vadilal (counter-petitioner in that case) to show cause why the application should not be granted and he resisted the application on the ground that it was time-barred . . . The Subordinate Judge overruled the said plea, and dismissed the application (on 14th September, 1903) on the following ground:—
>
> 'As to the merits I do not think that the applicant can succeed. Mr. Karpurram has thrown all costs on the applicant Fulchand and Vadilal's

1. (1905) I. L. R. 30 Bom. 56. 2. (1922) 36 C. L. J. 484.

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darkhast was due to Fulchand's default. He raised frivolous objections in Vadilal's application for execution and I consider the order made is a good one. The application for review is rejected with costs'."

On appeal against this order the appellate Judge amended the order granting review to a certain extent. It was held that no appeal lay from the order of 14th September, 1903 and the proper procedure was to file an appeal from the order of 20th December, 1902. So far as I gather from this case, the Court which refused review in the first instance did not issue anything which it called a *"rule nisi"* because we find no reference to a discharge of any such rule in its final order. On the procedure which the Bombay High Court laid down in that case the High Court must have held that in spite of the failure to say anything in the order about the discharge of the rule the rule was in fact discharged in that order and the third stage had not been reached. I gather therefore that by the statement at page 57 that a *"rule nisi"* was issued what was meant was the issue of a notice to the counter-petitioner to show cause why the application should not be granted. Now, applying this view it seems to be on all fours with the present case. It is quite clear that the mere fact that the merits were considered will not prevent the order being one in the second stage. The Subordinate Judge in that case, as already stated, apparently did not realise that there are three stages and his order appears to be exactly similar to the one in the present case. He says, "The application for review is rejected with costs." I may note that in the text of the judgment quoted above it is said that the application was "dismissed". If there is any distinction between dismissal and rejection, I think it strengthens the argument for the appellants. In that case the word used by the Court itself was "rejected" as in this. But the High Court seems to have considered that even if the application had been dismissed the result would have been the same and the proceedings would not have passed the second stage. On full consideration, therefore, I consider that the facts in *Vadilal* v. *Fulchand*[1] appear to be precisely the same as those in the present case and that this case really supports the contention of the appellants rather than that of the respondent seeing that it was there held that the order was passed at the end of the second

1. (1905) I. L. R. 30 Bom. 56.

stage. I therefore allow this appeal and the original appeal will be remanded for decision on the other points.

Costs of this appeal will abide the result of that appeal.

S. R. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR DINSHAH MULLA.

The Commissioner of Income-tax, Central Provinces and Berar .. *Appellant**

v.

Sir S. M. Chitnavis, since deceased (now represented by Krishna Rao, minor, through his guardian Parwati Bai Lady Chitnavis) .. *Respondent.*

Income-tax Act (XI of 1922), S. 24—Bad debts, deduction for, when allowable—Assessee not the sole arbiter to decide whether a debt is bad and when it became bad.

Although in assessing to income-tax the amount of the profits and gains of a year, bad debts of a business are necessarily deductible, they must be bad debts incurred in that particular year. For the purpose of computing yearly profits and gains each year is a separate self-contained period time, in regard to which profits earned or losses sustained before its commencement are irrelevant.

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions of fact to be determined, in the event of dispute, not by the *ipse dixit* of the assessee or by the exercise of any so-called "option" on his part, but by the appropriate tribunal upon a consideration of all relevant and admissible evidence.

Judgment of the Full Bench of the Court of the Judicial Commissioner, Central Provinces, (117 I. C. 258), reversed.

Appeal No. 71 of 1930 from a judgment of the Court of the Judicial Commissioner, Central Provinces, dated the 6th December, 1928, upon a reference by the Commissioner of Income-tax, Central Provinces and Berar, under S. 66 of the Indian Income-tax Act, 1922.

The main question for determination on the appeal was: Has an assessee an absolute option to decide in what year a debt due to him or any part of that debt is to be treated as bad and therefore to affect the amount of profits received in that year? The Full Bench of the Court of the Judicial Commissioner having answered the question in favour of the assessee-respondent, a

* P. C. Appeal No. 71 of 1930. 26th April, 1932.

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petition was preferred by the Commissioner of Income-tax under S. 66-A of the Income-tax Act, and S. 109 (*c*) of the Civil Procedure Code, for leave to appeal to His Majesty in Council. The learned Judicial Commissioners held, following *Banarsi Prasad* v. *Kashi Krishna Narain,*[1] that the case was fit for appeal (under S. 109 (*c*) of the Civil Procedure Code) on the ground that the point in dispute was of great public importance.

The order granting leave to appeal is reported in *Commissioner of Income-tax, Nagpur* v. *Chitnavis.*[2]

A preliminary objection by the respondent that the case was not a fit one for leave to appeal to His Majesty in Council and that the leave was not properly given, was overruled by their Lordships.

Dunne, K. C. and *Reginald Hills* for appellant.

Latter, K. C. and *Jinnah* for respondent.

26th April, 1932. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—This is an appeal from a judgment of the Court of the Judicial Commissioner, Central Provinces, upon a reference of questions of law, made at the instance of an assessee, under S. 66 (2) of the Indian Income-tax Act, 1922, which will hereafter be referred to as the Act.

The questions involved were considered by the said Court to be of such importance that the case was (after argument before two Commissioners) re-argued before a Full Bench.

Two separate and distinct matters were raised for decision before the said Court, and its adjudication upon each was adverse to the present appellant. In respect of one of such matters he made no attempt to appeal, and the dispute in regard thereto is at an end. In regard to the other matter, however, he applied to the said Court for leave to appeal to His Majesty in Council, and in response to that application the Court certified that the requirements of S. 109 (*c*) of the Code of Civil Procedure, 1908, were fulfilled, "inasmuch as a question of great public importance is involved in the case."

Their Lordships draw attention to this aspect of the case at the outset in view of the contentions which were advanced before them on behalf of the respondent.

The facts of the case may now be stated.

1. (1900) L. R. 28 I. A. 11: I. L. R. 23 A. 227: 11 M. L. J. 149 (P. C.).
2. (1929) 119 I. C. 689.

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Sir Shankar Rao Chitnavis (who will be referred to as the assessee) for the purpose of assessment to income-tax for the year 1926—1927 had, under S. 22 of the Act, to make a return of his total income during the year 1925—1926. He returned that income at Rs. 74,668. The Income-tax Officer, proceeding under S. 23 of the Act, by his order, dated the 17th January, 1927, assessed the total income at a figure of Rs. 1,16,480 In arriving at this figure the Officer had (*inter alia*) disallowed certain deductions which had been made by the assessee. The assessee appealed, under S. 30 of the Act, against the assessment to the Assistant Commissioner, who, by his order, dated the 25th April, 1927, reduced the amount of the assessment to Rs. 1,13,012. The Assistant Commissioner allowed some, but disallowed others, of the said deductions.

Among the deductions which the assessee had made from the gross income of his business was a sum of Rs. 17,983-11-6 for bad debts. The Officer had disallowed Rs. 7,481-13-9 of this deduction, thereby increasing the figure of assessment by that amount. The Assistant Commissioner affirmed this disallowance. It is round this sum of Rs. 7,481-13-9, and the right of the assessee to deduct it, that this appeal revolves.

The Officer, in his order, dealt with the matter thus:

"Bad debts claimed amount to Rs. 17,983-11-6. Lists were called for and scrutinised and found that as much as Rs. 7,481-13-9 are very old and time-barred "

He accordingly would not allow the Rs. 7,481-13-9 to be deducted.

The Assistant Commissioner, in his order, used the following language:—

"It is urged that the whole of the bad debt amounting to Rs 17,982 should have been allowed. Lists were called for showing details of dates when the amounts were due in order to ascertain when the debts were really ascertained to be bad and on examination it was found that Rs. 7,481 were on account of old bad debts which could not be allowed in the account year. The rest were allowed. Mr. Zinzarde argues that it should be left to the assessee to declare when the debts were bad and the Income-tax Officer should not go on the presumption that the amount had become time-barred in previous years. It appears to me that the criterion to know when the debt is bad is that all the legal remedies to recover fail. The assessee could not be said to be able to recover an old debt although he may entertain a hope to recover. Mere hope will not convert an irrecoverable loan into a recoverable item It is, I think, not right to allow sums which had become time-barred long before the account year."

The assessee then required the Commissioner to refer to the High Court, under S. 66 (2) of the Act, certain questions of law

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alleged to arise out of the order of the Assistant Commissioner, that which related to the said sum of Rs. 7,481-13-9 being described in the assessee's petition in these terms:—

"Has not the assessee got the option of declaring debts bad when he finds after sufficient waiting that from the circumstances of the debtors he is unable to recover them? Can the Income-tax authority deprive the assessee of this option? Should not the Income-tax Officer and the Assistant Commissioner have allowed Rs. 7,481-13-9 to the assessee on the same considerations on which the remaining amount out of Rs. 17,982 claimed by him was allowed?"

An oral affirmation was made by the general agent of the assessee, which contained the following statement in regard to the bad debts:—

"The bad debts, amounting to Rs. 7,481, had already gone bad, owing to their being time-barred much before the account year. That is they had gone time-barred in previous account years. But we did not write them off in the hope that they would be collected later on. But as they did not come to be so collected, they were written off during the account year."

The Commissioner, in accordance with S. 66 (2) of the Act, drew up a statement of the case and referred it, with his own opinion thereon, to the Court of the Judicial Commissioner. The statement contains two passages which require to be set out. The first is this:

"Rs. 7,481-13-9.—In all, the assessee had claimed a deduction of Rs. 17,982 on account of bad debts. Of these, debts amounting to Rs. 10,105 were such as had fallen bad during the account year and were written off in that year and were allowed. Debts amounting to Rs. 7,481-13-9 were very old and had become bad on account of being time-barred or otherwise much before the account year. They should have been written off in those years and were therefore not allowed."

The other passage runs thus:

"I beg to say that the assessment is to be made on the income of the previous year. This is arrived at after making certain deductions or allowances specified in the Act. These deductions or allowances must also relate to the previous year. Expenditure, actual or notional, that does not relate to the previous year cannot be allowed. The Act does not allow losses to be carried forward from one year to another. Bad debts are a form of notional expenditure and such expenditure must be deemed to be incurred when the debts become bad, that is when they are found to be irrecoverable. When they become bad is a question of fact to be determined by the Income-tax Officer. It is clear, I submit, that an assessee cannot be allowed to accumulate bad debts and write them off in a year when he will escape the largest possible amount of income-tax by doing so. This answers the first two parts of the first question. The contention that the bad debts amounting to Rs. 7,481 should have been allowed on the same ground as the balance of the total claim of Rs. 17,982 was allowed does not hold good, inasmuch as the remaining debts became bad during the account year and were written off during that period and as such were correctly allowed. I submit therefore that this part of the question should be answered in the negative."

The opinion of the Full Bench was unanimous on the points involved in the reference, and in accordance therewith

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the Court of the Judicial Commissioner by order of the 13th December, 1928, answered the question in relation to bad debts as follows:—

"The assessee has the option of declaring debts bad when he finds, after sufficient waiting, that from the circumstances of the debtors he is unable to recover them. As the law at present stands the income-tax authority cannot deprive the assessee of this option. The present non-applicant was, therefore, entitled to the deduction of Rs. 7,481-13-9 on the same consideration on which the balance of the amount of Rs. 17,892 was allowed."

The grounds for this decision are contained in the opinion delivered by Mr. Kinkhede, Additional Judicial Commissioner, with which the two other members of the Court merely expressed their agreement. He took the view as their Lordships read his opinion, (1) that an assessee is entitled in ascertaining his profits for a year to deduct such debts as he adjudges to be in that year bad debts; (2) that in assessing the taxable profits for any account year the assessee is entitled to have deducted the whole amount which the assessee has in fact written off as irrecoverable in his accounts of that year; and (3) that in this regard the assessee is the sole arbiter, and that his decision is final. That this correctly represents the view of the Judicial Commissioner may be seen from the following passages in his opinion. After stating that the argument of the assessee's Counsel (based upon some official Manual*) was correct, he said: "It entitles the assessee to urge that in deducing the taxable income in the shape of book profits of the account year, the whole of the amount of bad debts written off by him in his account as irrecoverable in the account year must be deducted". And later on he uses the following language: "The assessee must for obvious reasons be the sole arbiter of his own rights and privileges as regards the business he conducts in his own interest. What is to his interest, and what is prejudicial to him, must depend upon his own decision. It therefore follows that on the question whether to treat any particular debt as bad or irrecoverable, his word or decision must be final; for he alone is or can be the judge of the risks, chances and circumstances which may affect the recovery or non-recovery of that debt from his debtor." In other words, the Judicial Commissioner thinks that the assessee is the sole person to decide whether a debt is bad and when it became bad.

*The Manual referred to is the "Income-tax Manual," 2nd edition, Vol. I, Part III, paragraph 35, pages 97, 98.—K J. R.

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The Judicial Commissioner in coming to this view seems to have been to some extent influenced by the mistaken belief that if a creditor writes a debt off in his books as bad, that act in some way puts an end to any right ever to recover the debt. This would appear from the following extract from his opinion:—

"An entry in the creditor's account books writing off a debt as a bad debt in any particular year is under such circumstances likely to be interpreted by the debtor as *prima facie* good evidence of conduct on the part of the creditor wherefrom an abandonment of his right to demand it might reasonably be inferred so as to serve as a good answer to any future demand, on the occasion of any adjustment or fresh loan. Such an entry is, in my opinion, a conscious act on the creditor's part whereby he determines his election, once and for ever, to treat the debt referred to therein as bad or irrecoverable. It, therefore, stands to reason that the creditor must have full discretion in the matter, because, it is he, and not the Income-tax Officer, who knows, or must be deemed to know, the circumstances and risks as well as chances of recovery from his debtor. The Income-tax Officer cannot, therefore, legally insist that the assessee must subordinate his own will or discretion and even his decision in the matter to his decision."

Their Lordships are of opinion that the views of the Judicial Commissioner enumerated above are erroneous, and that the assessee has no such decisive voice as suggested.

Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains. But the losses must be losses incurred in that year. You may not, when setting out to ascertain the profits and gains of one year, deduct a loss which had in fact been incurred before the commencement of that year. If you did, you would not arrive at the true profits and gains of the year. For the purpose of computing yearly profits and gains, each year is a separate self-contained period time, in regard to which profits earned or losses sustained before its commencement are irrelevant. It thus follows that a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining the profits of that year, because the loss had not been sustained in that year.

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of

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dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute-barred debt is not necessarily bad; neither is a debt which is not statute-barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact to be determined after consideration of all relevant circumstances.

If, therefore, the order and decision of the Court of the Judicial Commissioner depend upon the view that this question of fact is one as to which the sole arbiter is the assessee, that order and decision cannot stand.

It was, however, argued by Mr. Latter on behalf of the respondent that the appeal must be dismissed. He conceded that an assessee was not entitled, in computing his business profits and gains of one year, to deduct a loss in fact incurred in an earlier year. Further he said that he was not concerned to argue that an assessee was the sole arbiter to decide whether a debt was bad, and when it had become bad, because this particular assessee was entitled to succeed upon the evidence as it stood in this particular case. He claimed that in this particular case, the deduction of the Rs. 7,481-13-9 had been disallowed by the Officer and the Assistant Commissioner solely upon the insufficient ground that the debts represented by that sum had become statute-barred before the year in question; and that accordingly the debts being admittedly bad there was no evidence to justify the disallowance of the deduction in the particular year.

Their Lordships are not prepared to accept the view that the disallowance rested solely on the fact that the limitation period had expired. The debts are stated to be not only time-barred but are also described as "very old," and as "old bad debts which could not be allowed in the account year".

However this may be, it is clear that the members of the Court of the Judicial Commissioner intended to decide and thought that they were deciding, not a question affecting only a particular assessee and depending upon the state of the evidence in a particular case, but a question of great public importance affecting assessees generally, and depending upon general principles.

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The questions for reference under S. 66 of the Act (which were framed by the assessee) are, perhaps, not very happily worded; but the use of the word "option" and the question whether the income-tax authority can deprive the assessee of the alleged option help to throw light upon what was the real issue between the parties. Their Lordships feel no doubt as to what that issue was, and how it arose. The Officer (under S. 23 of the Act), after considering the evidence and account books produced, disallowed the deduction; and the Assistant Commissioner confirmed the disallowance. The argument on behalf of the assessee is apparent in the order of the Assistant Commissioner. He states therein that the pleader for the assessee "argues that it should be left to the assessee to declare when the debts were bad, and the Income-tax Officer should not go on the presumption that the amount had become time-barred in previous years." From this their Lordships are satisfied that the attitude adopted by the assessee, when challenged, was to decline to establish by evidence that these old debts had not already become bad before the commencement of the year of account, and to claim the right to be sole arbiter of the question in dispute. That was the real issue between the parties which the Court of the Judicial Commissioner (wrongly, as their Lordships conceive) decided in favour of the assessee.

In their Lordships' opinion the question which was referred to the Court in relation to bad debts should have been answered as follows:—

"The assessee has no 'option' of declaring debts bad. Whether a debt is bad, and when it became bad, are questions of fact to be determined in case of dispute not by the assessee or by the exercise of any 'option' on his part, but by the appropriate tribunal upon a consideration of all relevant and admissible evidence. In the circumstances of the present case it is not possible to say that the Income-tax Officer and the Assistant Commissioner should have allowed Rs. 7,481-13-9 to the assessee on the same consideration on which the remaining amount of Rs. 17,982 claimed by him was allowed."

Their Lordships will, accordingly, humbly advise His Majesty that this appeal should be allowed and the order of the Assistant Commissioner, dated the 25th April, 1927, restored so far as relates to the Rs. 7,481-13-9.

There will be no costs of this appeal.

Solicitor for appellant: *Solicitor, India Office.*

Solicitor for respondent: *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

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PRIVY COUNCIL.

[On appeal from the Court of Appeal for the Federated Malay States (State of Perak).]

PRESENT :—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND LORD MACMILLAN.

Tuan Man and another .. *Appellants**

v.

Che Som and others .. *Respondents.*

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Administration—Suit for—Proper plaintiff—Right of beneficiary—Non-joinder of legal representative—Effect of—Remand by appellate Court—Indication of order to be passed by trial Court—Impropriety.

In an action for administration the only proper plaintiff to recover the asset of the deceased, is (in default of evidence to the contrary) the legal personal representative of the deceased and even if a beneficiary could sue in his own right, making the legal personal representative a defendant, his only claim would be an order for transfer of the asset to the legal personal representative, to which claim all the defences available against the legal personal representative would be open to the contesting defendants. The addition of the legal personal representative as a party is not the mere curing of some technical defect not affecting the substance of the dispute between the original parties to the action. It goes to the substance of the plaintiff's claim.

It is hardly in accordance with precedent that a Court of Appeal should, after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties.

Appeal No. 61 of 1930 from the decision of the Court of Appeal for the Federated Malay States reversing the decree of Burton, J., dated the 26th November, 1928.

Wilfrid Greene, K. C. and *Cyril Radcliffe* for appellants.

Sir Gerald Hurst, K. C. and *F. O. Langley* for respondents.

19th February, 1932. Their Lordships' judgment was delivered by

LORD RUSSELL OF KILLOWEN.—This appeal is brought by the defendants to an action which was tried by Burton, J., at

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* P. C. Appeal No. 61 of 1930. 19th February, 1932.

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Ipoh in the State of Perak. The action was dismissed; but an appeal by the plaintiffs to the Court of Appeal of the Federated Malay States was allowed, and an order was made by that Court, which is set out hereafter, and from which the defendants have appealed to His Majesty in Council.

For the proper appreciation of the cause of action which the plaintiffs seek to enforce, and of the methods and procedure which they adopted for that purpose, and of the relationship of the parties, it is necessary to embark upon considerable detail.

Tuan Kundor was a Rajah of Raman, in the kingdom of Siam, who died in the year 1867. He was the owner of a tin mine at Klian Hitam in Siam. He had nine children, five sons and four daughters, all of whom, according to one witness, survived him. His eldest son was Tuan Timoon, who became Rajah and entered into possession of the mine on his father's death. On the death of Tuan Timoon, in the year 1875, he was succeeded as Rajah by his brother, Tuan Jagong, who also took possession of the mine and kept it until his death in 1901. Tuan Timoon had left a widow him surviving, Raja Prempuan, who subsequently married Tuan Jagong. She survived Tuan Jagong, and on his death she took possession of his property and of the tin mine. She continued in possession of the tin mine until her death in 1916. Letters of administration with her will annexed were granted in 1918 to the appellants, who assumed and continued in possession of the tin mine.

Their title to the tin mine was called in question by the present action, which was commenced on the 17th September, 1927. By that time all the children of Tuan Kundor had died. The plaintiffs in the action were (1) Tuan Balai Jawa, the son of Tuan Timoon; (2) Tuan Kalumpang, the son of Tuan Cherik (a son of Tuan Kundor); (3) Nai Tuan Tandok, the son of a daughter of Tuan Kundor; (4) Toh Nang Bayam, a daughter of Tuan Jagong; (5) Toh Nang Kechik, the daughter of Tuan Timoon; and (6) Toh Nang Keboon, a daughter of another daughter of Tuan Kundor. The first-named plaintiff died *pendente lite*, and his administrator, Che Som, was substituted as a plaintiff in his stead. A few further facts as to pedigree should be stated. Tuan Jagong left another daughter, Tuan Kembang, who was married to the said Tuan Kalumpang, and also a son, Tuan Leebeh, who had disappeared in the year 1902 and of whom nothing had since been heard.

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One other fact of importance must be stated. The tin mine in question was until the year 1909 situate in the kingdom of Siam. In that year certain Siamese territory, which included the mine, was ceded by treaty to the Government of Perak.

In view of the various contentions which have at different times been raised on behalf of the plaintiffs, it is necessary to scrutinize with some care the cause of action alleged in the plaint and the nature of the relief which is therein claimed.

As their Lordships read this document, the plaintiffs claim to be entitled to the mine, or to shares therein, as persons who are entitled to shares in the estate of Tuan Kundor, as on an intestacy. Each plaintiff is claiming to assert a personal right of ownership in regard to the mine upon the footing that it belonged to Tuan Kundor, and that it still forms part of his estate. In terms, the claim of ownership is asserted in respect of the whole estate of Tuan Kundor, moveable and immoveable, but the asset more specifically referred to is the mine. The relief claimed by the prayer is (1) an account of Tuan Kundor's estate which the Raja Prempuan held "as trustee for the beneficiaries of Tuan Kundor," and which had come to the hands of the administrators of Raja Prempuan; (2) an enquiry as to "who are the beneficiaries of the estate of Tuan Kundor, deceased, and the shares to which they are entitled"; (3) distribution and payment to the plaintiffs of their shares; and (4) administration of the estate of Tuan Kundor.

That was the frame of the action as launched. As is apparent, it had a twofold object and asserted a twofold claim, viz., (*a*) to recover from the defendants assets alleged to belong to the estate of Tuan Kundor, and (*b*) to have those assets divided among the persons beneficially entitled to them.

By their defence the defendants called for strict proof of the allegation that the plaintiffs were entitled to share in the estate of Tuan Kundor. Further, they did not admit that Tuan Kundor had died intestate.

At the trial the plaintiffs called five witnesses; the defendant called none. It is of importance to note both what was proved and what was not proved. It will be convenient to state first what was not proved.

No evidence was called to establish any title in the plaintiffs. At the relevant dates the mine was situate in Siamese territory, but no attempt was made to prove who, according to

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Siamese law, would become entitled to the property, assuming it to be a fact (which itself was not proved) that Tuan Kundor had died intestate. No attempt was made to establish by legal proof that the plaintiffs had any beneficial or other interest in the mine.

It is true that reliance was placed upon a document which was executed by Raja Prempuan in the year 1904, and it may be that the plaintiffs considered that the document sufficiently proved their case in these respects; but, as will hereafter appear, when the terms of the document are set out, it is quite insufficient for this purpose.

The only witness called who could speak as to events in Tuan Kundor's lifetime was an old man who had been in the service of the family. From his evidence it would appear that Tuan Kundor was in the habit of making payments out of the profits of the mine to his brothers and sisters and to his children; that on his death Tuan Timoon had possession of the mine and made similar distributions among relations; that on his death Tuan Jagong had possession of the mine and pursued the same practice; and that when Tuan Jagong died, his widow, Raja Prempuan, received the money from the mine.

There is nothing in that evidence to assist the plaintiffs in establishing the title which they claim. Indeed, it would suggest, if anything, successive ownership of the mine in Tuan Kundor, Tuan Timoon and Tuan Jagong, coupled with some sort of benefits conferred by them upon their relatives. It would certainly appear to be inconsistent with the view that the mine still forms part of the estate of Tuan Kundor.

The matter, however, is carried a stage further by the evidence of Tuan Kalumpang (hereinafter referred to as Kalumpang), who was the only one of the plaintiffs to give evidence. He stated that, after the death of Tuan Jagong, Raja Prempuan "took charge of the property and, among the rest of the property, of the mine"; and he added, "I objected before the *Kathi* because Che Ning"—[*i. e.*, Raja Prempuan]—" did not give the shares to the *waris*. We wanted the *Kathi* to distribute the estate according to Mohammedan law."

This evidence refers to a law suit which Kalumpang instituted in 1903 before the *Kathi*, or Judge, but it leaves in

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puan had constituted herself a trustee for the plaintiffs, and it was pointed out by the Counsel for the defendants that such a suggestion was inconsistent with the pleadings. Thereupon Counsel for the plaintiffs in his reply said that the letter was not a declaration, but "an admission that she was trustee for the specific purpose of distributing according to Mohammedan law."

From the trial judgment an appeal was made to the Court of Appeal and was heard by three Judges. Counsel for the appellants, in opening the appeal, asked for a declaration that the mine still formed part of the estate of Tuan Kundor and ought to be distributed as such, and for an enquiry as to the persons then entitled and in what shares, presumably upon that footing. Thereupon the defendant's Counsel pointed out that the plaintiffs had failed to prove that they had any interest in the mine, or that Tuan Kundor had died intestate, or how the mine had devolved. In reply, notwithstanding that no evidence as to any foreign law had been given, Counsel for the plaintiffs contended (1) that the letter was sufficient evidence that Tuan Kundor's estate devolved by Mohammedan law, and (2) that Tuan Kundor's representative was not a necessary party to the action, because by Mohammedan law the property of an intestate vested at once in his heirs as tenants in common. He accordingly claimed the mine as specific property, and amended the claim for relief to the following form:—

"1. Declaration that defendants as legal representatives of the Raja Prempuan hold the mine as trustees for the persons entitled by Mohamedan law to share in distribution of the estate of Tuan Kundor.

"2. Enquiries as to who are such persons as aforesaid?

"3. Transfer to such persons in undivided shares or alternatively sale of mine subject to incumbrances and payment into Court of proceeds of sale to credit of this suit.

"4. Account of rents and profits from mine since death of Raja Prempuan.

"5. Payment into Court of amount found due in pursuance of paragraph 4.

"6. Liberty to apply."

It was suggested in argument before the Board that this amendment showed that the letter was relied upon as a declaration of trust by which Raja Prempuan constituted herself a trustee of the mine. Their Lordships cannot accept this view. It is, in their opinion, clear that the plaintiffs' case throughout

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has been based upon the contention that the mine at the date of the action formed part of the estate of Tuan Kundor.

The Judges in the Appeal Court, although concurring in the order which was eventually made, do not appear to have been in agreement in their views of the case. The Chief Justice treated the letter as an admission that the mine formed part of Tuan Kundor's estate and, in the absence of evidence in rebuttal, as sufficient to establish that fact. He also added, however, that the letter was a contract of compromise, a view which suggests that the letter created a title, and was not merely evidence of a pre-existing title. The learned Judge, however, pointed out that the pedigree of the plaintiffs and their heirship to Tuan Kundor had not been proved, and that, except for the letter, no evidence had been given as to the law applicable to the distribution of Tuan Kundor's estate. As to this, their Lordships are content to observe that the letter of Raja Prempuan can in no sense be described as evidence of any law.

The learned Chief Justice, however, pointed out that it was necessary, since the plaintiffs claimed administration of the mine as part of Tuan Kundor's estate, that the legal personal representative of Tuan Kundor should be a party to the action. He appears to have overlooked the amended relief, which in the course of the hearing of the appeal had been claimed by Counsel for the plaintiffs.

Farrer-Manby, J., thought that the case of the plaintiffs was based on the letter, which he treated as an admission of a pre-existing trust. He agreed with the order proposed by the Chief Justice.

Prichard, J., simply agreed with the judgment of the Chief Justice.

Later, supplemental judgments were delivered, in the course of which the Chief Justice stated that no evidence had been tendered as to "any contractual or other effect" which the letter had on the rights of the parties under Siamese law, and that although in his view the plaintiffs' claim could be supported without resort to the contractual effect of the letter, a higher tribunal might take a different view. He thought, therefore, that the plaintiffs should have liberty to lead further evidence as to the effect of the letter by Siamese law. The plaintiffs formally declined to avail themselves of this liberty.

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The order made by the Court of Appeal must now be considered; it is, so far as material, in the following terms:—

"It is ordered that the cross-appeals of the defendants-respondents be dismissed with costs to be taxed. And it is ordered that the judgment, dated the 26th day of October, 1928, of Burton, J., be reversed. And it is ordered that the suit do stand over for six months from the date of this order or for such extended time, if any, as may be allowed by the Court of First Instance, to give time for the plaintiffs-appellants to remedy the defect caused by the legal personal representatives of Tuan Kundor not being a party to the suit in such manner as they may be advised. And it is ordered that if the plaintiffs-appellants do not remedy the said defect within the time aforesaid or within such extended time as aforesaid the defendants-respondents be at liberty to apply to the Court of First Instance for an order dismissing the suit with costs to be taxed, and if the suit be so dismissed with costs the plaintiffs-appellants do pay to the defendants-respondents their taxed costs of this appeal. And it is ordered that if such defect be remedied within the time aforesaid, or within such extended time as aforesaid the plaintiffs-appellants be at liberty to apply to the Court of First Instance for judgment in the following terms with such variations, if any, as altered circumstances may render necessary (and with the omission of Enquiries Nos. 2 and 3 hereinafter directed if in the circumstances the Court of First Instance shall consider such enquiries to be unnecessary), that is to say:—

"Declare that the lease of a mining land, District of Upper Perak (Kroh), No. 1 Kroh, dated the 8th day of November, 1904, issued to Che Ning binti Che Nek in lieu of the Siamese Mining Lease in the plaint mentioned, forms part of the estate of Phya Ratana Phakdi Tuan Kundor *alias* Phya Ratana Phakdi, in the plaint referred to as Tuan Kundor deceased, and ought to be administered by the Court accordingly."

"And it is ordered that the following enquiries be made, that is to say:—

(1) An enquiry whether there is any debt of the said Tuan Kundor remaining unpaid;

(2) An enquiry whether the said Tuan Kundor disposed of the mine now held under the said lease by will or died intestate in respect thereof;

(3) If the said Tuan Kundor disposed of the said mine by will, an enquiry as to the terms and effect by Siamese law of the said will and who are now entitled thereunder to the said mine;

(4) If the said Tuan Kundor died intestate as to the said mine, an enquiry as to who by Siamese law became entitled to the said mine on the death of the said Tuan Kundor, and if any of such persons have since died, who are their respective legal personal representatives or otherwise entitled to their respective shares.

"And it is ordered that an account be taken (making all just allowances) of the rents and profits of the said mine come to the hands of the defendants-respondents or any of them or to the hands of any other person or persons by the order or for the use of the said defendants-respondents or any of them as from the 21st day of September, 1921.

"And it is ordered that the said enquiries and the said account be held and taken before the Registrar of the Court and that he do certify to the Court of First Instance the result of such enquiries and account

"And it is ordered that the defendants-respondents do pay to the plaintiffs-appellants the taxed costs of the suit down to and including the hearing before Burton, J., and the taxed costs of this appeal including in such taxed costs the fees of two advocates both at the original hearing and

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in the Court of Appeal. And it is ordered that the further consideration of the suit be adjourned.

"And all parties are to be at liberty to apply."

"Liberty to apply to the Court of First Instance for the appointment of a receiver of the rents and profits and generally as the parties may be advised.

"And lastly that the plaintiffs-appellants be at liberty to lead further evidence under S. 27 of the Courts Enactment No. 14 of 1918 by calling the witness, Haji Che Soh bin Che Nik (*Kathi*) or by calling other expert evidence, as to the effect of Exhibit 'C' by Siamese law. In the event of the plaintiffs-appellants availing themselves of this liberty they shall notify the Registrar and the defendants-respondents at least fourteen days before the opening of the sittings of the Court of Appeal at Ipoh on the 24th day of September, 1929, in which case this appeal shall be set down for further hearing at the sittings aforesaid, and the defendants-respondents shall be at liberty to lead evidence on the same issue, and shall be entitled to their costs of such further hearing in any event."

This appears to their Lordships to be an unusual order the terms of which need careful consideration.

Certain cross-appeals by the defendants were dismissed. Upon the main appeal the judgment of the trial Judge is reversed, the result of which is that the action no longer stands dismissed. It is then ordered that the suit do stand over for a period to enable the plaintiffs to remedy the defect caused by the legal personal representative of Tuan Kundor not being a party to the suit. If the defect is not remedied within the period the defendants may apply to the trial Judge for an order dismissing the suit. If the defect is remedied the plaintiffs may apply to the trial Judge for an order to be made by him in terms set forth by the Court of Appeal. It is hardly in accordance with precedent that a Court of Appeal should, after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard, and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties.

This order cannot, in their Lordships' opinion, stand. Its only operative effect is to send the case back to the trial Judge for the purpose of dismissing the action if Tuan Kundor's legal personal representative is not added as a party, or (if he is added) for the purpose of making a cut-and-dried order. But this addition of the legal personal representative as a party is not, in their Lordships' view, the mere curing of some technical defect not affecting the substance of the dispute between

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the original parties to the action. In their opinion, the matter goes to the substance of the plaintiffs' action.

Their Lordships, as before stated, are satisfied that the case of the plaintiffs is and has been throughout that the mine formed and still forms part of Tuan Kundor's estate. They seek to recover possession of that asset from the defendants and to have that asset administered when recovered. The suggestion (faintly raised at one stage before the Board) that the letter is their root of title, cannot prevail in view of the fact that not only was no evidence given of the effect of the letter according to Siamese law, but the opportunity of giving such evidence was declined.

The twofold relief sought by the appellants finds no foundation for either branch. The only proper plaintiff to recover the asset is (in default of evidence to the contrary) the legal personal representative of Tuan Kundor, and even if a beneficiary could sue in his own right, making the legal personal representative a defendant, his only claim would be an order for transfer of the asset to the legal personal representative, to which claim all defences available against the legal personal representative would be open to the present defendants. The letter could not be used (as Kalumpang might perhaps personally use it) to ground an estoppel in favour of the legal personal representative, even though Kalumpang himself became such legal personal representative. It might be used as an admission, *i.e.*, as a piece of evidence, and if no other evidence was given, it might be sufficient foundation for a judgment in favour of the legal personal representative for his recovery of the asset. There remains, however, for consideration the second branch of the relief claimed. No foundation has been laid for this at all. There is no shred of evidence in the case to show that any of the plaintiffs is, under Siamese law or any other law, beneficially interested in the estate of Tuan Kundor. The letter is no such evidence; at the most it is a statement by a third person of her opinion as to the law applicable, and that under that law Kalumpang was entitled to some share.

As to the suggestion that the letter constitutes a root of title as being itself a declaration of trust, such a contention, even if raised by the plaintiffs in the Courts below, is equally devoid of any foundation to support it. Whether the letter according to Siamese law creates what in this country would

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be called a trust, and whether it creates enforceable rights, are questions of fact which should be proved, which were not proved, and which the plaintiffs have declined to prove.

In the circumstances above indicated, their Lordships feel no doubt that the action of the plaintiffs failed, not from some technical defect capable of being remedied without hardship or injustice to the parties, but from matters of real substance, which it was not open to the Judges in the Appeal Court to adjust as they have attempted to do.

Whether a legal personal representative of Tuan Kundor if and when constituted can after all these years successfully assert in fresh proceedings a claim to the mine against the present defendants is a matter upon which their Lordships are not only unwilling, but unable to express any view; but, for the reasons given, they are of opinion that this appeal succeeds. The order of the Court of Appeal should be discharged and the order of the trial Judge restored. The respondents will pay the costs of the appellants both here and in the Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Mayo, Elder & Rutherfords.*
Solicitors for respondents: *Peacock & Goddard.*
S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

A. S. Radhakrishna Aiyar .. *Petitioner* (Accused).*

Radhakrishna Aiyar, *In re.*

Penal Code (XLV of 1860), S. 171-G—Applicability—Statement of fact—General imputations of misconduct, insufficient.

It is necessary for the applicability of S. 171-G of the Penal Code that the statement should be made as a statement of fact and not as a general imputation or as a matter of opinion. Even where one or two statements in a document can properly be described as statements of fact but the bulk of it is taken up with general imputations of misconduct unaccompanied by any charges of particular acts of misconduct, they cannot properly be described as statements of fact within the meaning of S. 171-G of the Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Chingleput Division in Criminal Appeal No. 8 of 1931 preferred against the judgment

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* Cr R. C. No. 710 of 1931. 28th January, 1932.
Cr. R. P. No. 643 of 1931.

of the Court of the Sub-Divisional 1st Class Magistrate of Saidapet in Calendar Case No. 126 of 1931.

Radha-krishna Aiyar, *In re.*

A. S. Sivakaminathan for petitioner.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER. *Waller, J.*—The petitioner in this case was convicted of the offence of criminal defamation under S. 500, Indian Penal Code, and his conviction was confirmed on appeal. The defamation was embodied in a document which was published by him during an election to a Taluk Board, at which election one Ramanatha Aiyar (the respondent) was a candidate In revision it is contended on his behalf that he should have been prosecuted for an offence under S. 171-G, Indian Penal Code, which could not be done without the sanction of the Local Government. Several decisions have been cited before us on this point but we propose to deal with the petition on another ground. S. 171-G, Indian Penal Code, has been framed on the lines of S. 1 of an analogous English Act, the Act to amend the Corrupt and Illegal Practices Prevention Act of 1883, which was passed in 1895. S. 1 of that Act defines as an illegal practice the making or publishing of any false statement of fact in relation to the personal character or conduct of a candidate. S. 171-G, Indian Penal Code, runs as follows:—

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"Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false, and which he either knows or believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate shall be punished with fine."

It is not apparent why the Indian Legislature should have thought fit to use the words "any statement purporting to be a statement of fact," but what was intended doubtless was "any statement which is made as a statement of fact" and that comes to much the same thing as is conveyed by the English Statute. One thing at any rate is clear, that something must be stated as a fact and not as a general imputation or as a matter of opinion. The document in question is in the following terms:—

"This is to inform all that the Village Munsif, Krishnaswami Aiyar and his son Ramanatha Aiyar in Zamin Pallavaram have no properties. They will not shrink from committing even murder. Both are in enjoyment of some properties by virtue of an adoption which is false and opposed to law.

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Those properties belong to Government. Krishnaswami Aiyar of them has been making many kinds of forgeries. They are doing many kinds of harm to the poor. Ramanatha Aiyar of them is an atheist. They are eating (misappropriating) Government money unjustly by committing forgeries, misrepresentation and false personation. They are unjustly eating the common money and the temple money in Zamin Pallavaram. They are doing acts which even mean-minded men will not (stoop to) do. They are doing many other improper acts. It is understood that the said Ramanatha Aiyar stands as a candidate for membership of the Taluk Board. I respectfully request that vote should not be given to him for the abovementioned reasons "

It begins by asserting that the candidate and his father have no properties. As that statement, which is a statement of fact, is followed by another statement that they are in enjoyment of some properties it requires no consideration. The next imputation is that they will not shrink from committing even murder; that can hardly be described as a statement of fact. The next statement is that they are in enjoyment of some properties by virtue of an adoption which is false and opposed to law; that might possibly be described as a mixed statement of fact and opinion. The next statement is that they are doing many kinds of harm to the poor; that again is not a statement of fact. The next statement is that the candidate is an atheist; that again may possibly be described as a statement of fact. The next four sentences embody general charges of forgery, misrepresentation, false personation, misappropriation, acts "which even mean-minded men will-not stoop to do"; not a single specific act of forgery or misrepresentation or misappropriation is charged and the allegations can most certainly not be described as statement of facts. The English Act provides that any person who shall make or publish any false statement of fact such as is contemplated by it may be restrained by injunction by the High Court of Justice from repeating the false statement and for the purpose of granting an interim injunction *prima facie* proof of the falsity of the statement shall be sufficient. No similar provision has been made in India, but the section of the English Act makes it clear what statements of fact fall within its mischief. They are statements of fact of the falsity of which *prima facie* proof is possible. When the statement is that a man will not shrink from committing murder, how is that expression of opinion to be disproved? When it is alleged that a man does many kinds of harm to the poor, that he misappropriates Government money, that he commits forgery and so forth, how would it be possible, in the absence of particulars, to prove *prima facie* that

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the allegations are false? It is true that there are in the document in question one or two statements which can properly be described as statements of fact, but the bulk of it is taken up with general imputations of misconduct unaccompanied by any charges of particular acts of misconduct and they cannot properly be described as statements of fact within the meaning of S. 171-G, Indian Penal Code. That being so, we think that the petitioner was properly convicted and sentenced for an offence under S. 500 of the Indian Penal Code. The offending document, as a whole, was not one to which S. 171-G, Indian Penal Code, applied and he could not therefore be prosecuted under that section. The petition is dismissed.

S. R. *Petition dismissed.*

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[illegible] COURT OF JUD[illegible] AT MADRAS.

[illegible] USTICE

[illegible] *espond-*

Shanmuga-sundara Mudaliar *v.* Ratnavelu Mudaliar.

Appeal against the order of the Court of the Subordinate Judge of Chingleput, dated 13th November, 1928 and made in E. P. No. 76 of 1928 in O. S. No. 5 of 1922.

N. S. Srinivasa Aiyar for appellants.

Respondent not represented.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In O. S. No. 5 of 1922 on the file of the Subordinate Judge of Chingleput the appellants as trustees of a certain temple obtained a decree for money against Defendant 1 and others. Defendant 1 among others appealed to this Court against that decree in Appeal No. 218 of 1925. Pending that appeal, Defendant 1 applied for stay of execution of the Subordinate Judge's decree, the amount of which we a[illegible] told by the [illegible]ppeal with interest had [illegible]
Rs. 7,0[illegible]
event[illegible]
tion th[illegible]
Court [illegible]

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decree appealed from came on for hearing before a learned Judge of this Court, and the learned Judge having regard to the circumstances of the case directed that so far as a moiety of the amount of the decree was concerned the 1st defendant should have stay of execution on his furnishing security for the amount of that moiety, but as regards the other moiety the learned Judge directed that the 1st defendant should pay that portion of the decree amount into Court, the decree-holders being allowed to draw the same out of Court on their furnishing security to the satisfaction of the Lower Court. These facts are clear from the affidavits and the order passed in connection with the application for stay of execution pending the appeal. Now what happened subsequently was this. The decree-holders did not trouble themselves about the execution of the decree any further, so the amount of Rs. 3,500 deposited by the 1st defendant into the Lower Court remained in the Lower Court without being drawn out by the decree-holders on furnishing security. The appeal was eventually successful so far as the 1st defendant was concerned. The present appeal arises out of a petition, E. P. No. 76 of 1928, filed by the 1st defendant in the Lower Court under S. 144 of the Code of Civil Procedure praying that the decree-holders may be directed to pay interest in respect of the amount of the moiety of the decree which the 1st defendant had deposited in the Lower Court, from the date of his deposit to the date of the judgment of the High Court on appeal in his favour. The decree-holders objected to the Court decreeing any interest in the circumstances, their argument being that they had in fact derived no benefit out of the decree amount deposited in the Lower Court, and that consequently they should not be directed to pay any interest in respect of that amount. The learned Subordinate Judge overruled that contention and directed that the decree-holders should pay interest on the amount deposited in Court for the period mentioned by him. The plaintiffs—decree-holders—are the appellants before us.

Before us it was contended by the learned advocate for the appellants that on a proper construction of S. 144, Civil Procedure Code, all that the Court could direct the unsuccessful decree-holders to do was to restore the benefit that they might have derived by virtue of the decree that was subsequently reversed by the appellate Court. In support of that argument the learned advocate drew our attention to some reported deci-

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sions. In my view, that is not the proper standpoint from which this case is to be looked at in order to arrive at a correct decision on the point before us. The principle of restitution is based upon the legal maxim that the act of the Court should injure none. *Actus curiae neminem gravabit.* That this is the principle is made clear by the judgment of Lord Cairns in *Rodger* v. *The Comptoir d'Escompte de Paris*[1] where the principles that ought to govern Courts in directing restitution in such cases are discussed. I do not propose to read all the passages, though very many of them would be relevant to the point before me. The following are among the relevant passages occurring in that judgment:—

"It is contended on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will [illegible] reason of an act of the Court have paid a sum which it is now ascertained [illegible]s ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it [illegible] be the object of all Courts to arrive at will not have been arrived at [illegible] the persons who have had their money improperly taken from them ha[illegible] money restored to them, with interest, during the time that the mone[illegible] been withheld."

See pp. 475 and 476. Now as I read those passages, it seems to me that it is the injury which has been caused to a party who has been ultimately successful as a final result of the litigation that the Courts seek to remedy by virtue of proceedings taken in restitution. Such a party is to be placed—so far as it may be done—in the same position which he would have occupied had not the injury been done to him. If that is the principle, then, I think, the answer to the question before me is quite clear. The 1st defendant was, as a result of the proceedings, taken by the appellants in pursuance of a decree, which was ultimately reversed, directed to put into Court a certain sum of money. If that decision had not been passed, the 1st defendant would not have been deprived of the use of the money, and the injury done to him therefore could be remedied only by paying him back not only the principal amount of that money but also some compensation for the deprivation of the use of the money

1. (1871) L. R. 3 P. C. 465.

from date of deposit to date of judgment of the High Court reversing the Lower Court's decree. The wordings of S. 144 also make this point clear. The section is not drafted merely with a view of depriving the decree-holder in the prior litigation of any benefit which he has actually in fact derived from the decree, but the section is drafted with a view to benefit, by way of restitution or otherwise, the party who had been injured by an act of Court, found to be ultimately erroneous. The section says:

> "In so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may [illegible] parties in the position which they would have occupied but for [illegible] such part thereof as has been varied or reversed."

[illegible]e decline to accept the contention raised before us by the [illegible]ned advocate for the appellants, that we should view the case from the standpoint of the benefit that the appellants actually derived from the decree they obtained in the first Court. The learned advocate emphasised on the words "so far as may be" occurring in the section. As I understand the section, those words have no relevancy so far as the point now before us is concerned. It may happen that in very many cases restitution, as ordinarily understood, is impossible. Property may have been sold and purchased by *bona fide* strangers, and in some cases it might be impossible to restore *in specie* the property of which the defendant might have been deprived. In such and similar cases, justice requires that the injured party should be restored, if not to the very thing of which he was deprived, at least to as much of its equivalent as can be given to him in the place of the thing the restoration of which has become impossible. The subsequent wordings of the section, namely, "the Court may take any order . . . . for payment of interest, damages, etc.," make it clear that it is the injury that the 1st defendant suffered that has to be compensated for in a case like the present. The learned advocate for the appellants referred us to some cases which he stated were inconsistent with the view that I am inclined to adopt in this case. On a careful perusal of the cases to which our attention was drawn, it is clear that those cases do not establish the proposition he contends for. I must remark that in properly understanding the expressions used by learned Judges in particular cases we must not forget to inquire

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what exactly was the relief that a party was actually claiming before the Court in such proceedings. If, as a matter of fact, a person in the position of the 1st defendant claimed only interest from the time when the decree-holder actually drew the money out of Court, and was content with claiming the same only, and did not claim compensation from the time when he parted with the money, then the remarks occurring in judgments dealing with such contentions should be understood only with reference to the prayer actually contained in the petition before the Court. As far as I am able to see, the passages in the judgments referred to us do not lay down that a person in the position of the 1st defendant would not be entitled to anythi[illegible] more than the benefit which the decree-holder act[illegible] virtue of the prior decree. On the other hand[illegible] was drawn to two cases *Dalu Ram* v. *Ramana*[illegible]*ra-bhai* v. *Maneklal*[3] both of which support the p[illegible]on contended for by the 1st defendant. In *Hirabhai* v. *Maneklal*[3] the money was in Court for some time. The decree-holder had no benefit in the sense that he was able to make interest out of that money, as during the period in question the money was lying idle in Court; yet the learned Judges decided that the decree-holder was bound to pay interest for the period during which the money was lying in Court. To use the words of the judgment, " The decree-holder has had the advantage of the money lying in Court until the appeal was heard and that would be a sufficient advantage to enable 1st defendant to succeed." In the other case *Dalu Ram* v. *Ramanand*[2] the decree-holder was directed to withdraw the money from Court after furnishing security, and, in that respect, that case is very similar to the one before us. The learned Judges decided that even in such a case the decree-holder was bound to pay interest to the defendant on the amount for the period during which the money was lying idle without the decree-holder having furnished security. If the test is the injury done to the defendant, then the circumstance that the decree-holder considered it to his benefit in any particular case not to actually draw the money out of Court but to have it ready in Court, would not make any difference, and I am not at all satisfied that it will not be to the benefit of the decree-holder to have an order in his favour that the money is to lie in Court and that he can draw it at any time

2. A. I. R. 1929 Pat. 593. 3. (1925) 87 I. C. 713.

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on furnishing security. In this particular case that it was a benefit to the decree-holders to have money ready in Court is clear to me from another circumstance. Evidently the 1st defendant wanted to have stay of execution in respect of the whole decree. The learned Judge was inclined to grant stay on the 1st defendant furnishing security in respect of a moiety of the decree amount. The order passed by the learned Judge with reference to the other moiety is, in my view, entirely due to the request made by the decree-holders that money may be directed to be paid into Court and that they should be allowed to draw the same on furnishing security. If such a thing was not to their benefit, I am unable to understand why they wanted such orders to be made with reference to that moiety of that decree amount. Therefore the question of benefit to the decree-holders is, in my view, entirely immaterial and irrelevant for the purposes of the present case; and even otherwise, in the present case I am clear that there was an order which was (as already stated) to the benefit of the decree-holders; and consequently, having got a benefit, it does not lie in their mouths to say that they are not liable or responsible for having deprived the 1st defendant of the use of the money during the period. In addition to the case in *Rodger* v. *The Comptoir d'Escompte de Paris*[1] I wish to refer to the observations of Sir Barnes Peacock in *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia*[4]:

> "It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of Appeal does not necessarily enter into the question, whether a decree, which it is about to reverse, has been executed or not. The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorised the Lower Court to cause restitution to be made of all that the party, against whom the erroneous decree had been enforced, had been deprived by reason of its having been enforced."

See also the further observations at p. 993. I wish also to refer to the observations of Sir Asutosh Mookerjee, J., in *Ashutosh* v. *Upendra*[5] where the learned Judge after referring to the decision in *Rodger* v. *The Comptoir d'Escompte de Paris*[1], emphasises on the correct principle underlying the whole

1. (1871) L. R. 3 P. C. 465.
4. (1868) Beng. L. R. Sup. Vol. 985 at 992 (F.B.).
5. (1916) 24 C. L. J. 467 at 474.

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discussion, namely, that it is the legal injury that is done to the person in the position of the defendant that is sought to be remedied in such cases. See also a later Privy Council decision in *Jai Berham* v. *Kedar Nath Marwari.*[6]

I think it is enough for our purpose to be guided strictly by the provisions of S. 144 of the Code of Civil Procedure; and having regard to its wordings, I think that the 1st defendant is entitled to the benefit he claims in the present case, namely, interest—as for the use of the money—of which he has been deprived, for the period during which that money was not available to him, he having been directed to part with that money by a decree that has been ultimately reversed as erroneous.

I agree that the appeal must be dismissed but without costs as nobody appears for the respondent. In order to make matters clear, I should add that the 1st defendant claimed restitution with interest at 12 per cent. and the learned Subordinate Judge was in my opinion right in having allowed him only interest at 6 per cent.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Chinnaswami Padayachi .. *Appellant** (*Defendant*)

v.

Darmalinga Padayachi .. *Respondent* (*Plaintiff*).

Chinnaswami Padayachi *v.* Darmalinga Padayachi.

*Mortgage—Successive mortgagees filing suits—Separate suits filed not impleading each other—Rival purchasers—First purchaser entitled to possession—*Lis pendens*—Application to mortgage suits.*

The plaintiff and defendant were rival purchasers of the same property in mortgage suits brought by the first and second mortgagees on simple mortgages, without impleading each other in their respective suits. The plaintiff was a second mortgagee-purchaser, who purchased in a suit first instituted, the purchase being later than that of defendant. The defendant was a first mortgagee-purchaser, who purchased in a later instituted suit, the purchase being earlier than that of plaintiff. The plaintiff sued to establish his right to unconditional possession of the suit property.

Held, that the defendant being the earlier purchaser was entitled to possession of the property.

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* S. A. No. 452 of 1928. 21st March, 1932.

6. (1922) L. R. 49 I. A. 351: I. L. R. 2 Pat. 10: 44 M. L. J. 735 (P. C.).

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Chinnu Pillai v. *Venkatasamy Chettiar*, (1915) I. L. R. 40 M. 77: 30 M. L. J. 347, criticised and not followed.

Venkatanarasammah v. *Ramiah*, (1879) I. L. R. 2 M. 108, *Muhammad Usan Rowthan* v. *Abdulla*, (1900) I. L. R. 24 M. 171: 10 M. L. J. 347, *Akatti Moidin Kutty* v. *Chirayil Ambu*, (1902) I. L. R. 26 M. 486, *Kutti Chettiar* v. *Subramania Chettiar*, (1909) I.L.R. 32 M. 485: 19 M. L. J. 728, *Mulla Vittil Seethi* v. *Achuthan Nair*, (1911) 21 M. L. J. 213 (F. B.), *Venkatagiri* v. *Sadagopachariar*, (1911) 22 M. L. J. 129 and *Ram Saneki Lal* v. *Janki Prasad*, A. I. R. 1931 All. 466 (F. B.), referred to.

The rule of *lis pendens* in mortgage suits only applies to transfers by the plaintiff or defendant of their respective interests after the suit including transfers by Court sale in money decrees against either party. But it does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*.

Har Pershad Lal v. *Dalmardan Singh*, (1905) I. L. R. 32 Cal. 891, *Venkatrama Aiyar* v. *Rangiyan Chetty*, (1923) 46 M. L. J. 258, *Abdul Muhammad Rowther* v. *Seethalakshmi Ammal*, (1930) 33 L. W. 109 and *Ram Saneki Lal* v. *Janki Prasad*, A.I.R. 1931 All. 466 (F. B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 195 of 1926 (A. S. No. 307 of 1925, District Court of South Arcot), preferred against the decree of the Court of the District Munsif of Cuddalore in O. S. No. 527 of 1924.

N. S. Srinivasa Aiyar for appellant.

M. S. Vaidyanatha Aiyar for respondent.

The Court delivered the following

Krishnan Pandalai, J.

JUDGMENTS. *Krishnan Pandalai, J.*—The defendant appeals from a decree awarding the plaintiff possession of 1 acre and 32 cents of land comprised in A schedule with mesne profits. The dispute is between rival purchasers of the same property in mortgage suits brought by the first and second (simple) mortgagees, without impleading each other. The following are the material facts. Chakrapani, the owner of properties in A and B schedules, mortgaged them to the defendant on 21st July, 1905. On 4th November, 1905, he mortgaged A schedule properties together with 19 cents of other land to one Ponnuswami. Ponnuswami's (the second mortgagee's) heirs sued the mortgagor in O. S. No. 601 of 1914. By O. 34, R. 1 they were not required to join the first mortgagee in his suit and he was not joined accordingly, though they must have known that there was a first mortgage on the A schedule property, as it was registered. The 19 cents of land which was not included in the first mortgage was sold first and a part of the debt was realised. The decree-holders seem not to have taken any further steps to

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execute the decree for a considerable time against A schedule property owing probably to the fact it was subject to a prior mortgage. In this state of affairs the defendant brought his suit on the first mortgage in O. S. No. 274 of 1917 without impleading the second mortgagee and obtained a decree and in execution bought the properties in A and B schedules himself on 21st October, 1918 and obtained possession in January, 1919. The plaintiff obtained a transfer of the decree in O. S. No. 601 of 1914 from Ponnuswami's heirs and brought the A schedule property again to sale and purchased it himself in January, 1924. As he could not get possession he brought this suit in 1924. Thus A schedule property is the only property common to both mortgages. and in respect of it the plaintiff is a second mortgagee-purchaser who purchased in a suit first instituted, the purchase being later than that of the defendant; and the defendant is a first mortgagee-purchaser who purchased in a later instituted suit, the purchase being earlier than that of the plaintiff.

The plaintiff prayed for unconditional possession of A schedule property or in the alternative for permission to redeem A and B schedule properties on payment of the first mortgage debt. The defendant offered to redeem the plaintiff's second mortgage and if the Court should hold that the plaintiff is entitled to retain the property on redeeming the first mortgage he claimed the value of improvements effected on A schedule property. As both parties wanted to keep their purchase and for that purpose were willing to redeem each other, the real question was which of them had the better title to the land and on what terms, if any, he should redeem the other. The second issue sufficiently covered this point and the third issue raised the question of defendant's improvements.

At the trial the plaintiff, no doubt on advice, gave up the prayer for alternative relief, *i.e.*, possession on condition of redeeming the defendant's first mortgage debt and as the Munsif says elected to proceed to trial on the footing that he is entitled to unconditional possession of the property. The second issue which raised the question whether the plaintiff or the defendant was entitled to redeem the other and keep the property was thus dropped and with it the third issue was also dropped. The only issue left was whether the plaintiff was entitled to unconditional possession.

mortgage who had paid off a first simple mortgage, for sale. The actual decree of the Lower Courts which was confirmed by the High Court was for sale free of all encumbrances, unless the defendant (purchaser) redeemed the plaintiff (2nd mortgagee). But the discussion and opinions were not limited to the facts and in fact the judgment of Srinivasa Aiyangar, J., is mostly devoted to a criticism of the observations in *Venkatagiri* v. *Sadagopachariar*[7] and the cases relied on in it. That case *Venkatagiri* v. *Sadagopachariar*[7] however was not between mortgagees or between a mortgagee and a purchaser but like the present case a claim for undisturbed possession by an earlier first mortgagee-purchaser who had got possession against a later second mortgagee-purchaser. It was held that the plaintiff as earlier purchaser who had been put into possession could [illegible] disturbed by the later second mortgagee-purchaser whose [illegible] redeem the prior mortgage and then to sell [illegible] amount of both first and second mortgages. [illegible] guage employed in these three decisions and [illegible] rlier by the later was perhaps unavoidably [illegible] facts of each case necessarily demanded, [illegible] only for what it actually decides. As [illegible] in *Venkataramana Reddi* v. *Rangiah*

> [illegible] urally took full advantage of the general and broad [illegible] eir respective contentions, found in the numerous [illegible] legal questions involved. Even learned Judges [illegible] pect) have been naturally unable to lay down the [illegible] governing these questions in judgments pronounced by them in particular cases with all the necessary qualifications and limitations which would have to be applied to those rules if additional facts and circumstances of a special nature besides those appearing in the particular cases in which the decisions were given were involved therein."

The present case is exactly similar in principle to *Venkatanarasammah* v. *Ramiah*,[2] *Muhammad Usan Rowthan* v. *Abdulla*,[3] *Akatti Moidin Kutty* v. *Chirayil Ambu*,[4] *Kutti Chettiar* v. *Subramania Chettiar*[5] and *Venkatagiri* v. *Sadagopachariar*.[7] In all these cases the contest was for possession between rival purchasers of the mortgaged property in two successive mortgage suits from each of which the other mortgagee was excluded. In all of them the earlier purchaser was held entitled to the property whether he pur-

2. (1879) I.L.R. 2 M. 108.
3. (1900) I.L.R. 24 M. 171: 10 M.L.J. 347.
4. (1902) I.L.R. 26 M 486.
5. (1909) I.L.R. 32 M. 485: 19 M.L.J. 728.
7. (1911) 22 M. L. J. 129.
8. (1921) 41 M. L. J. 399 at 406.

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chased in the prior mortgagee's or puisne mortgagee's suit. In *Venkatanarasammah* v. *Ramiah*[2] and *Muhammad Usan Rowthan* v. *Abdulla*,[3] *Kutti Chettiar* v. *Subramania Chettiar*[5] and *Venkatagiri* v. *Sadagopachariar*,[7] the purchase in the prior mortgagee's suit was earlier. In *Akatti Moidin Kutty* v. *Chirayil Ambu*[4] the purchase in the puisne mortgagee's suit was earlier. In *Muhammad Usan Rowthan* v. *Abdulla*[3] and *Venkatagiri* v. *Sadagopachariar*[7] though the earlier mortgagee-purchaser had been nominally impleaded in the suit in the later mortgage, the purchase in the latter suit was subject to the rights of the prior mortgages which were not determined in that suit and hence the contest between the purchasers in the third suit. In the majority of cases even in the third suit the rights after purchase on the footing of the rival mortgages were not determined but the question determined was confined to had the better title by purchase. Only in o *Usan Rowthan* v. *Abdulla*,[3] was it hel earlier purchaser had the better title, he co only on default of the later purchaser r mortgage. In the other cases it was f the suit which was in ejectment pre between the parties being determined, mutual redemption of the mortgages a default. The present is another instance suit as originally framed might have be the rights of the parties on their severa has been deliberately so limited by the plaintiff as impossible to decide anything beyond the question whether the plaintiff is entitled to unconditional possession.

Having regard to the question before the Full Bench and the language employed by the learned Judges with regard to the above decisions, I am unable to agree with the opinion expressed in *Chinnu Pillai* v. *Venkatasamy Chettiar*[1] that *Venkatanarasammah* v. *Ramiah*[2] and *Muhammad Usan Rowthan* v. *Abdulla*[3] and similar cases were disapproved by the Full Bench and ought not to be followed. In fact the Full Bench judgment at pages 230, 231 expressly refers to and approves of the principle of *Venka*

1. (1915) I. L. R. 40 M. 77: 30 M. L. J. 347.
3. (1900) I.L.R. 24 M. 171:
4. (1902) I.L.R. 26 M. 486. 5. (1909)
7. (1911) 22 M. L.

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v. *Ramiah*[3] that the mortgagee who became first entitled to possession was awarded it against the other. Similarly at page 233 the judgment refers with approval to *Muhammad Usan Rowthan* v. *Abdulla*[3] pointing out that the first mortgagee being the first purchaser in possession could not be turned out in execution by the second mortgagee who had merely bought subject to the rights of the first purchaser. Referring to Shepherd, J.'s judgment in that case the Full Bench say that "the observation that the right of redemption and no other was all that remained to the second mortgagee in the circumstances of the case was perfectly right" and that no general proposition to that effect was laid down. The learned Judges of the Full Bench could not have forgotten that the question referred to them was not which of two rival purchasers under simple mortgage decrees was entitled to possession but whether a puisne mortgagee in possession under a usufructuary mortgage could be turned out of possession or be compelled to redeem a purchaser in a simple first mortgagee's suit to which he was not a party. The principle that of two purchasers in successive mortgage suits, both mortgages being simple, the earlier purchaser is the one entitled to possession was therefore not only not disapproved but expressly approved by the Full Bench.

In this view I am not called upon to enter into any lengthy discussion whether and in what circumstances a puisne mortgagee who has not been impleaded in a prior mortgagee's decree which has resulted in the sale of the property may maintain a suit for sale subject to the prior mortgage as if it had not been sued upon. That is not the question in this case. But the discussion in *Venkatagiri* v. *Sadagopachariar*[7] and *Chinnu Pillai* v. *Venkatasamy Chettiar*[1] reveals a difference of opinion on the effect of the Full Bench decision in this question. The former case favours the view that such a suit by the puisne mortgagee is possible only till the first mortgagee has obtained his own decree for sale. The only result of the puisne mortgagee not being impleaded in the prior mortgagee's suit being to put him in the same position as he would have been if so impleaded, *i.e.*, to give him an opportunity to redeem the prior mortgage. But the latter case would appear to take

1. (1915) I.L.R. 40 M. 77: 30 M.L.J. 347.
2. (1879) I.L.R. 2 M. 108.
3. (1900) I.L.R. 24 M. 171: 10 M.L.J. 347.
7. (1911) 22 M.L.J. 129.

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the view that in such circumstances the puisne mortgagee has not merely the right to redeem but also the right to sell subject to the prior mortgage. This view is based on the principle that as against the puisne mortgagee the prior mortgagee's suit being an improperly constituted suit has no legal effect whatever and may be treated as non-existent. If so, the purchaser in the first mortgagee's suit got no title whatever against the puisne mortgagee and the only course open to the first mortgagee is to sue again. That this is not necessary, and that the purchase is good at least to the extent of enabling the purchaser to redeem the puisne mortgagee in the character of the ultimate owner of the equity of redemption is stated at page 86 where it is said that

> "If he (2nd defendant in the case who was the purchaser in the prior mortgagee's suit) wants to keep the property as purchaser he can only do so by redeeming the plaintiffs."

The same result follows from the 7th proposition (page 92) where the purchaser in the first mortgagee's suit is described as the ultimate owner of the equity of redemption. The main thesis is however maintained at pages 86 and 87 that the later purchaser in the second mortgagee's suit is entitled to possession of the property from the previous purchaser in the first mortgagee's suit for the reason that the latter suit was not properly constituted whereas the former suit was. But what about the rights of the earlier purchaser as first mortgagee? The answer is that in the second mortgagee's later suit for sale he may, if he is unwilling to redeem the second mortgage, get the balance of the sale proceeds atter satisfying the second mortgage. That is to say, he becomes postponed to the second mortgagee who thus gets the advantage of becoming first mortgagee as a result of the improperly constituted suit brought by the original first mortgagee. It is difficult to see why the first mortgagee's suit which is not to affect the second mortgagee in any way should have the result of conferring a substantial advantage on him. And it is equally difficult to understand how if the sale in the first mortgagee's suit can, notwithstanding its improper constitution, convey to the purchaser the equity of redemption subject to the second mortgage and if the purchaser at that sale may still as plaintiff bring a suit as first mortgagee, impleading of course the purchaser in the second mortgagee's suit, he cannot successfully defend the possession already obtained in exercise of that mortgage right.

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Starting from the principle that the first mortgagee's suit being improperly constituted should have no legal effect whatever against the second mortgagee, the result is arrived at somewhat inconsistently that while on the one hand the purchaser becomes the ultimate owner of the equity of redemption who is as such entitled to redeem the second mortgage, on the other he retains the character of the first mortgagee sufficiently to enable him to sue again on that mortgage but not sufficiently to retain his priority in the sale proceeds in case of a sale by the second mortgagee or to keep the possession which he has already got against the purchaser in that sale.

I am not satisfied that this is the result of the Full Bench case, nor am I satisfied that the cases beginning with *Venkatanarasammah* v. *Ramiah*[2] are overruled thereby. If they are to be followed the suit must be dismissed.

The questions involved in contests between rival purchasers in successive mortgage suits in which the other mortgagees were excluded were again elaborately considered by the Full Bench of the Allahabad High Court in *Ram Sanehi Lal* v. *Janki Prasad*[9]. There were two simple mortgages of 1911 and 1912. The second mortgagee sued the mortgagor first in March, 1922, without joining the first mortgagee and then the first mortgagee sued the mortgagor in August 23 without joining the second. One J. P. purchased the property first in January, 1925, in the second mortgagee's suit but did not get actual possession. Then the first mortgagee purchased the property in his own suit in November, 1925 and got possession. J. P. sued the first mortgagee-purchaser for possession. On a reference to a Full Bench four out of five Judges held:

1. If the purchaser in the first mortgagee's suit is suing as plaintiff—

A. (*a*) he can sue again for money if his suit is not barred.

(*b*) he cannot sue for money if it is barred.

B. (*a*) If he was the earlier purchaser he can redeem the second mortgage and get possession even if a suit on the prior mortgage is barred.

(*b*) If he was the later purchaser he cannot even redeem.

2. If the purchaser in the second mortgagee's suit is suing as plaintiff—

2. (1879) I. L. R. 2 M. 108.

9. A. I. R. 1931 All. 466 (F. B.).

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(*a*) if the plaintiff was the earlier purchaser he must redeem the prior mortgage and the defendant cannot compel the plaintiff to be redeemed.

(*b*) if the plaintiff was the later purchaser he must first redeem the prior mortgage but the defendant can then compel the plaintiff to be redeemed in respect of the second mortgage.

It will be observed that according to this view the only case in which the first mortgagee-purchaser will be without remedy either to sue again for money or to compel the second mortgagee to redeem him is when a second suit for money has become barred and at the same time as purchaser he is later than the second mortgagee and not having possession is compelled to sue for it. In all other cases, the first mortgagee may have one or other of three remedies: (1) either a second suit for money, or (2) recovery of possession from the later purchaser, or (3) retention of possession as against even an earlier purchaser till he is redeemed. The other learned Judge gave his opinion separately but except on two points, *viz.*, as to *lis pendens* and as to the right of the second mortgagee to sue again for sale subject to the first mortgage, he concurred with his colleagues. He agreed that the auction purchaser in execution of a prior mortgagee's decree without impleading the subsequent mortgagee acquires the right of the mortgagor including the right of possession. He also agreed that it is the first purchaser who gets the property without regard to the priority of the mortgage in enforcement of which the property is sold. Thus all the five Judges concurred in the principle of the earlier Madras decisions that the title to the property belongs to the earlier purchaser though the suit in which that purchase took place was improperly constituted in the sense that the subsequent mortgagee was not therein impleaded. The difference of opinion was only on the question whether the excluded second mortgagee is affected by the earlier proceedings to the extent that he is thereafter bound to redeem the earlier mortgage and can no longer sue for sale subject to the earlier mortgage. The majority in Allahabad approve the view taken in *Venkatagiri* v. *Sadagopachariar*[7] and *Venkataramana Iyer* v. *Gompertz*[10] on this matter while Mukerjee, J., took the view favoured in *Chinnu Pillai* v. *Venkatasamy Chettiar*[1].

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1. (1915) I. L. R. 40 M. 77: 30 M. L. J. 347.

7. (1911) 22 M.L.J. 129.

10. (1908) I.L.R. 31 M. 425: 18 M.L.J. 298.

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Quite apart from the title derived from the sale the right of the first mortgagee-purchaser to use his mortgage as a shield has recently been upheld by the Judicial Committee in *Sukhi* v. *Ghulam Safdar Khan*,[11] and by this Court in *Venkataramana Reddi* v. *Rangiah Chetty*[12]. In the former case there were two simple mortgages in 1874 and 1875 to K. R. and a third mortgage by conditional sale in 1883 to G. S. In 1886 K. R. brought a suit on the first two mortgages without making G. S. a party and bought the property himself. After K. R.'s death Sukhi, his widow, gave the property to J. R. and N. R. who in 1902 executed a fourth mortgage to her for securing an annuity. In 1909 G. S. sued J. R. and N. R. on his mortgage without joining Sukhi and got a decree for foreclosure on payment to them of the mortgages of 1874 and 1875. In 1914 Sukhi sued G. S., K. R. and N. R. on the mortgage of 1902. From the above dates and facts it is seen that Sukhi, the plaintiff, occupied the position of fourth mortgagee. But her mortgagors were representatives in interest of K. R. the 1st and 2nd mortgagee-purchaser in the suit of 1886 in which the 3rd mortgagee was not a party. Her security therefore included the right of K. R. by that purchase which included the right of the 1st and 2nd mortgagees. The defendant G.S. was the 3rd mortgagee who had foreclosed J.R. and N. R. as ultimate owner of the equity of redemption but without impleading the 4th mortgagee plaintiff.

The plaintiff claimed as mortgagee from J. R. and N. R. the security of their rights to the first and second mortgages. Though G. S. had in his own suit paid this amount and it had been taken away by J. R. and N. R. the Privy Council held that that payment could not bind the plaintiff who was not impleaded. It was, therefore, ordered that G. S. should, in the first instance, pay the amount of the first and second mortgages to Sukhi, that in case he did so, the plaintiff should pay to G. S. the amount of his third mortgage of 1883 and if she did so she could have the usual mortgage decree for the entire sum of all the mortgages including her own. As to the principle on which the payment of the first and second mortgages which were 40 years old at the time of the suit was ordered the Privy Council said that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale

11. (1921) L. R 48 I. A. 465: I. L. R. 43 All. 469: 42 M. L. J. 15 (P.C.).
12. (1921) 41 M. L. J. 399.

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under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield. Applied to this case it shows that the defendant the first mortgagee-purchaser is entitled to retain his possession till he is paid off the amount of that mortgage and is not liable according to the observations in *Chinnu Pillai* v. *Venkatasamy Chettiar*[1] to be turned out of possession on the ground that the suit on the first mortgage was improperly constituted and to be relegated to a fresh suit long ago barred by limitation. The same view as to using a mortgage as a shield was taken in *Venkatramana Reddi* v. *Rangiah Chetty*[12].

The only difference between the Privy Council case and the present is that there the purchase on the first two mortgages was before the suit on the third mortgage whereas in the present case the defendant's purchase was after execution had begun on the decree on the second mortgage. It was therefore argued on the strength of some remarks in *Chinnu Pillai* v. *Venkatasamy Chettiar*[1] that the Court-sale in the defendant's suit was vitiated by *lis pendens*. At p. 87 it is stated that if a first mortgagee who has first obtained a decree without joining the second mortgagee purchases the property in execution after the second mortgagee has brought his suit on his own mortgage such purchase would be affected by *lis pendens* and that such a purchaser would have to give up possession to the later purchaser in the second mortgagee's suit. At p. 92 the same idea of the proceedings in an earlier mortgage suit becoming affected by *lis pendens* by reason of the institution of a subsequent mortgage suit is repeated in the 5th and 7th propositions. The 7th proposition contains a repetition of the statement in p. 87 and the 5th proposition is the converse case of the purchaser in a second mortgagee's suit being affected by *lis pendens* by reason of a subsequent suit by the first mortgagor making the second mortgagee and mortgagor parties. I confess to great difficulty in correctly describing the ground of these remarks (whether they are right or not) to be *lis pendens*. With the greatest respect, I understand by *lis pendens* the rule by which by reason of a suit being pending about the rights to some property, subsequent dealings by the parties with that

1. (1915) I. L. R. 40 M. 77: 30 M. L. J. 347.
12. (1921) 41 M. L. J. 399.

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property so as to prejudicially affect the determination of those rights in that suit are invalidated. The proceedings in earlier instituted suits cannot be affected by *lis pendens* by suits subsequently instituted. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not *lis pendens* but something else. Not only so, but I find difficulty in understanding how a mortgage suit brought by a first mortgagee can be affected by *lis pendens* because some one else who does not claim from him, *i.e.*, another mortgagee, has already sued to enforce his own rights. Both have rights against the same property not derived from each other but from the same owner. In my view the opinion expressed by Mukerjee, J. in *Ram Sanehi Lal* v. *Janki Prasad*[9] on the subject of *lis pendens* in mortgage suits is correct. It is that the rule only applies to transfers by the plaintiff or defendant of their respective interests after the suit including transfers by Court-sale in money decrees against either party. But it does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit is not affected by the doctrine of *lis pendens*. (Cf. per Mitra, J. in *Har Pershad Lal* v. *Dalmardan Singh*[13], *Venkatarama Aiyar* v. *Rangiyan Chetty*[14] and *Abdul Muhammad Rowther* v. *Seethalakshmi Ammal*[15].) No other authority has been adduced for invalidating the defendant's purchase on the ground of *lis pendens*.

For the above reasons the decrees of the Lower Courts are reversed and the suit dismissed with costs throughout.

Waller, J.

Waller, J.—I agree and have nothing to add. We have been asked to reconsider the order as to costs on the ground that the plaintiff and the Courts below were right in relying on the decision in *Chinnu Pillai* v. *Venkatasamy Chettiar.*[1] We see no reason to do so. The trouble was started by the plaintiff himself in the first Court. He has in this Court been given every opportunity of settling, but has not taken advantage of it. We are asked further to say that, in our view, a further

1. (1915) I. L. R. 40 M. 77: 30 M.L.J. 347.
9. A.I.R. 1931 All. 466 at 485 to 487 (F.B.). 13. (1905) I.L.R. 32 Cal. 891.
14. (1923) 46 M.L.J. 258. 15. (1930) 33 L. W. 109.

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suit will not be barred by O. 2, R. 2 of the Code of Civil Procedure. On that point, we decline to express any opinion.

K. C. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD WRIGHT, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Jehangir Shapoorji Taraporevala .. *Appellant**

v.

Reverend Savarkar, Secretary of the Bombay Tract and Book Society .. *Respondent.*

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Privy Council—Practice—Concurrent findings.

On an appeal to the Privy Council on an issue of fact, concurrent findings of two Courts in India are conclusive, unless where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure.

Appeal No. 114 of 1931 from a decree of the High Court, Bombay, in its appellate jurisdiction, dated the 29th November, 1929, which affirmed a decree of the same Court in its original jurisdiction, dated the 2nd April, 1928, and dismissed the plaintiff-appellant's suit.

R. K. Chappell, K.C., W. Wallach and *S. P. Khambatti* for appellant.

Dunne, K. C. and *Jinnah* for respondent.

27th June, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellant in the case is a photographer who in 1913 took a lease for ten years of certain premises owned by the Bombay Tract and Book Society, hereinafter called the Society, and later, in 1925, took a renewal of that lease for a further ten years from 1923. In 1927 the Society sold the property, subject to the appellant's leasehold interest, to one Kavarana. The appellant claims that this sale was in breach of an obligation undertaken to him by the Society in 1913 in consideration of his entering then into the lease, and he claims specific performance as under that obligation. The respondent is sued as secretary of the Society which is a charitable society in Bombay, formed according to its memorandum of association to circulate religious tracts, and managed by a committee, and with three trustees in whom its property was vested with powers of disposal. The secretary

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was named in the regulations as the proper person by whom the Society was to sue or be sued. The Society, who owned the house in question, retained certain portions for its own use, and leased to the appellant under the lease of the 11th February, 1913, certain portions of the ground and first floor and the whole of the second and third floors: by the lease the lessors covenanted (*inter alia*) to do all heavy repairs. The appellant's claim, as set out in paragraph 3 of the plaint, is as follows:—

"The said Society thereupon promised to the plaintiff that before selling the said building to a third party it would offer to sell the said building to the plaintiff at the net price free from brokerage obtainable from such intending purchaser, thus giving to the plaintiff the right of first refusal and the plaintiff in return promised to take the major part of the said building on a long lease upon terms and conditions orally agreed upon between the parties."

In the proceedings a further or alternative claim was set up, expressed as follows in Issue No. 7:—

"Whether the assurance mentioned in the letter of 9th May, 1927, from Athavle to the plaintiff amounted to an agreement on the part of the Society to give the plaintiff a right of first refusal in regard to the purchase of the property."

There is an obvious difference on the face of it between these two allegations. A right of first refusal, which is a vague expression, imports *prima facie* no more than an obligation to give a reasonable opportunity of buying to the appellant if or when the Society should desire to sell, whereas the alleged oral agreement involves the Society informing the appellant of any concrete offer from any intending purchaser before the Society could close with that offer, and giving the appellant a chance of then purchasing on preferential terms free from brokerage. The peculiarity of this case is that there is nowhere to be found in the various documents passing between the two parties, or in the leases or in the Society's minutes, any record or indication of any such bargain as the appellant alleges to have been orally made until the appellant wrote on the 10th September, 1927, after he had been informed of the completion of the sale to Kavarana; nor is there any written reference even to "a right of first refusal" until 1926. The appellant sought to prove his case by the oral evidence of himself, supported by that of Mr. Smith, who was the Society's secretary from 1912 until 1923, and also from inferences which he sought to draw from happenings between the parties between 1913 and 1927. The appellant deposed that he had spent

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Rs. 30,000 on taking possession under the lease and had only done so on the faith that he should have this additional right, so that the premises could not be sold away from him against his will. His evidence was that he had said to Mr. Smith that he would only take a lease and sink capital if he had the first refusal, and that Mr. Smith came back and assured him that the Society agreed that if and when they sold the premises they would give him the right of first refusal. Mr. Smith corroborated, and said he told him "the committee had agreed to give him the first refusal if they wanted to sell". Mr. Smith further said in cross-examination, "The first agreement [*sc.* in 1913] was simply that he [*sc.* the appellant] should have the first refusal. In 1918 or 1919 we discussed the matter, and it was agreed that as we were dealing direct with one another the price should be less brokerage . . . . I cannot say if I put this before the committee." The appellant, however, said, "There was no new agreement in 1919 to give me the first refusal." The minutes of the Society for 1912 and 1913 had been destroyed by white ants, but Mr. Smith cannot swear that any such agreement as is alleged was embodied in the minutes; there is nowhere any written note of it. As against the evidence of the appellant and Mr. Smith, Mr. Athavle, an advocate—now Coroner of Bombay —a member of committee of the Society in 1912 and 1920 and subsequently at all material times president, and Mr. Aston, now Judicial Commissioner in Sind and in 1912 a magistrate in Bombay, and a member of the committee at all material times till 1921, both deposed that they had never heard of any such condition being agreed, though if it had been they must have heard of it. Mr. Aston adds: " I think the secretary brought to the attention of the committee that appellant was a photographer and it would be hard if he had to turn out and lose his fittings. I think the committee agreed to give him notice of any sale to an intending purchaser that he might be able to bid. I do not recollect his being given any right to buy in preference to any other person." The Trial Judge was favourably impressed by this witness. What he states may well explain the genesis of the idea that the appellant was given any contractual right. This would well explain why there was no written record in the lease of any such right, because no right was understood. It is true that under S. 92 of the Indian Evidence Act evidence of such a collateral contract, if there were

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such, would not be excluded, though it would be strange to omit such a condition if it had been agreed. The Trial Judge acquits all the witnesses of any intention to give other than truthful evidence. But, taking all the evidence in the sense most beneficial to the appellant, their Lordships are of opinion that no such contract as the appellant alleges in paragraph 3 of his plaint is established. The obvious inference from the evidence appears to be that a friendly assurance was given to the appellant that in the event of the Society contemplating a sale of the property every consideration would be given to him as sitting tenant, so that he would have a fair opportunity of purchasing if so minded. Nor is the appellant's case strengthened by the subsequent happenings. In 1918 the Society had some idea of selling the property, and the appellant was informed of an offer [illegible]ciety had received. The idea fell through: the appellant [illegible] not then prepared to buy, the price being too high [illegible]ft lease was prepared to meet the case, in the [illegible] of the property being then sold, but was [illegible]. In 1919 the Society again considered the question of selling the property, and the appellant was informed of an offer which the Society had received from a third party to purchase at Rs. 210,000, and he offered to buy at Rs. 206,000. In his letter he stated that the difference was "the usual 2 per cent. to be paid to my friends who have brought about the sale. I mention this just in order to satisfy you that I am willing to pay you just the same amount of money as any outside purchaser would pay you to whom you would be selling the property." This last observation appears to be inconsistent with the appellant's present claim. The Society abandoned the project of selling because of the difficulty of obtaining for themselves other accommodation. The lease expired in 1923, and a new lease at an increased rent for ten years from 1923 was executed after considerable discussion on the 21st August, 1925; this lease is completely silent as to any such right as is alleged. The appellant states that no reference was made during these discussions to any right of first refusal, and Mr. Athavle says the same. The next material date is August, 1926, when, owing to the ravages of white ants, a joist fell, and it was obvious that the whole building needed very serious repairs. By that time the Society was in financial difficulties, and as they could not find money for the repairs it became urgent to sell, though the market had fallen very seriously since 1919. Mr. Athavle

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wrote to the then secretary on the 4th October, 1926, that he had told the appellant about the position and assured him that if he wished to buy the building they would give him preference over other would-be purchasers if his offer was reasonable. The appellant said in evidence that about this time Mr. Athavle referred to the appellant's right of first refusal, but this Mr. Athavle denied. A little later the sale was put into the hands of Gilbert Lodge and Company, house agents. In March, 1927, a certain amount of shoring up had been done, and the appellant was informed by letter that the Society hoped to be able to sell the building at once. On the 6th May, 1927, by letter, the appellant was informed of an offer of 1¼ lakhs, which appeared to have become abortive, and was invited to make a definite offer; he made no offer, but pressed for repairs. On the 9th May, 1927, Mr. Athavle used, in a letter of th[illegible] to the appellant, the words relied on as a separ[illegible] Issue No. 7:—"In intimating to you the state [illegible] in 1926] I told you that our only alternati[illegible] building, and we asked Mr. Gilbert Lodge [the [illegible] find a purchaser. I also assured you that we would give you the first refusal, and I adhere to that assurance even now." On the 20th May, 1927, Mr. Athavle wrote again to the appellant making a definite offer to sell at 1 lakh, adding, "It is now for you to come to a decision." The appellant did nothing, but continued to press for urgent repairs, which the Society continued to execute to the extent of about Rs. 4,000 until the 17th August, 1927. The appellant has remained in possession under the lease.

Their Lordships have carefully considered the whole of the correspondence of which these letters form a part and cannot find any such agreement as the appellant alleges. They cannot agree with the conclusion of the Acting Chief Justice, who holds not only that there was an agreement in the letter of the 9th May, 1927, but that there was consideration in that the appellant forebore in consideration of the Society's promise to insist on his right under the lease to have repairs executed. In fact, he insisted on repairs, and repairs were done, and there is no evidence that the assurance given by Mr. Athavle was given in return for any reciprocal promise from the appellant. It may be that the Society would have been bound by any promissory acts of Mr. Athavle, at least on the ground of his

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The Court delivered the following

JUDGMENT.—These appeals are against the dismissal by the Lower Court of three petitions by a petitioning creditor under S. 53 of the Provincial Insolvency Act seeking to avoid certain alleged fraudulent alienations The alienations attacked date from June and July, 1921. The insolvency petition was filed on 12th October, 1921. The three petitions, which were by the appellant, were put in in 1925. The District Judge's order was passed on 29th April, 1927. The District Judge did not finally decide the petitions on the merits, because he dis-[illegible]during the hearing of the petitions that the insolvent [illegible] for his discharge within the time granted, [illegible]anted had expired on 31st August, 1926. [illegible] for extension of time but the District [illegible]d went on to hold that by force of S. 43 of [illegible]solvency Act the adjudication is automatically [illegible]t therefore the three petitions will fail. Under [illegible]d the property of the insolvent to vest in the Official Receiver; but he evidently regarded the dismissal of the petitions as an automatic consequence of the annulment; and it is that legal position that has been attacked here.

The respondents contended *inter alia* that the District Judge had definitely decided that he would not exercise his power, if he had the power under S. 37, to allow the enquiry into the petitions to be continued. But I am quite clear that that is not so. The learned Judge says, regarding one petition, that he would have set it aside if the petitions had not failed on the technical ground, and of another he says that he finds it impossible to give a decision on the merits as the evidence has not been concluded. In his final order dismissing the petitions he makes no distinction between one and another but deals in one sentence with all three. So it is clear that he regarded himself as having no option but to dismiss the petitions once the adjudication was annulled. The correctness of that legal position has to be examined.

It is clear from Ss. 43 and 37 that when an adjudication is annulled under S. 43 the insolvency proceedings will come to an end except so far as they are kept alive by orders passed under S. 37. That position has been clearly laid down by a Bench of this Court in *Jethaji Peraji Firm* v. *Krishnayya*[1], where the

1. (1929) I. L. R. 52 M. 648 : 57 M. L. J. 116.

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Bench considers and to some extent relies upon the judgment of Tiruvenkatachariar, J. and myself in *Timmappa* v. *Devasi Harpal*[2]. The point from which the Bench differs from my judgment is, if I may say so with respect, based on some misapprehension of the language used by me. I say at page 462, "Under S. 43 therefore the annulment of adjudication is evidently intended to put an end to the insolvency proceedings as a whole." The Bench takes that to mean that I was saying that nothing of the insolvency jurisdiction remains after an order is passed under S. 43. But as S. 37 is itself stated by S. 43 to come into operation on the annulment of adjudication under S. 43, my language was not intended to convey that S. 37 did not come into operation at all. It is clear, however, that the adjudication is annulled save in so far as some direct order is passed and some direct condition is imposed by the Court [illegible] S. 37. *Prima facie*, therefore, if the adjudica[illegible] under S. 43, the insolvent is placed *status qu*[illegible] vency. But S. 37 says that

> "all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid ; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in, default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare."

This might be taken to imply that the original vesting is put an end to by the annulment of the adjudication; that is, that while acts done by the Court or the receiver up to the date of the annulment remain valid, such acts as have not been completed remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court directs their continuance. Therefore, for example, as I have indicated, the original vesting in the Official Receiver, while valid and validating all acts done under it up to the date of the annulment, does not continue but automatically comes to an end by the annulment and therefore has to be renewed by direct order if the Court wishes it to continue. Similarly I should infer, an enquiry under S. 53 or 54, begun prior to the annulment, stops short where it is on the date of the annulment and will not continue, unless by order of the Court it is directed to continue.

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2. (1928) 56 M. L. J. 458.

This is the position maintained by the respondents who argue further on the footing of *Jethaji Peraji Firm* v. *Krishnayya*[1] that the re-vesting under S. 37 will not permit the entertainment of a fresh petition to avoid but only permits continuance of an enquiry in the one already put in. It is not necessary however in this case to consider whether S. 37 would authorise the Court to entertain a fresh application to avoid since in the present case the Court had already received and given its permission to the prosecution of an enquiry on petitions already presented. I do not think this view is in substance at variance with that expressed in *Jethaji Peraji Firm* v. *Krishnayya*,[1] because the learned Judges there held in effect that the fresh order vesting the property in the Official Receiver implied a direction to him to continue any proceeding to avoid fraudulent alienation on which he had already embarked. It [illegible]ect to hold that a direction continuing the proceed-[illegible]cessary in law, but it would certainly be more [illegible]om the legal point of view if such a fresh direct[illegible] in express terms.

[illegible]uthority to give a direction to continue [illegible]gun seems to me also the practical [illegible] rulings in both *Timmappa* v. *Desai* [illegible]*raji Firm* v. *Krishnayya*[1] point out that [illegible]judication under S. 43 is by way of punish-[illegible]itrant debtor who refuses or neglects to apply [illegible]arge in time. If the effect of such refusal is going to [illegible] dismissal of all applications to avoid his fraudulent pref[illegible]ences, obviously a Court will be much more reluctant to exercise its powers under S. 43. I am clear that it cannot have been the intention of the legislature that a section intended to punish a debtor for his slackness was also intended to let him "get away" successfully with his fraudulent preferences. It does not meet this difficulty to say that the Official Receiver or the creditors may themselves apply to have the time extended, because that would merely mean that in order to continue the fraudulent preference enquiry the Court has to withhold its punishment from the debtor; in other words, the Court will be precluded at the same time from punishing the debtor by

1. (1929) I. L. R. 52 M. 648: 57 M.L.J. 116. 2. (1928) 56 M. L. J. 458.

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annulling the adjudication and from setting aside his fraudulent preferences.

I am therefore clear that S. 37 was intended to permit and does permit a Court to direct as one of the conditions of the annulment that proceedings begun with its permission under S. 53 or 54 shall not automatically cease because of the annulment but may be continued. In the present case such a direction cannot be spelt into the Lower Court's order vesting the property in the Official Receiver, since it was not the Official Receiver who was maintaining the proceedings under S. 53. What is necessary is a specific direction permitting the proceedings instituted by the appellant to continue.

I hold, therefore, that the Lower Court's view of its powers is erroneous and set aside its orders. It will now in the light of the above judgment consider how far, if at all, in respect of each alienation,—and of course with reference to ... each and the evidence adduced in each case,—it ... enquiry already begun by the appellant ought ... will give directions accordingly.

I may point out incidentally that it is not cle... that I. A. No. 182 is barred by time. I have not ... of the case fully put before me, but so far as I ... informed it appears that the alienee in that applicati... creditor and therefore the application is one not under S. ... the District Judge seems to hold but would be under S. 53.

For the reasons given therefore I reverse the order o... Lower Court and direct that it re-entertain the applicatio... pass orders accordingly. Costs up to date in all C... abide the result.

S. R. *Appeal allowed and case remanded.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Hong Kong.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Tsang Chuen .. *Appellant**

v.

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Tsang Chuen v. Li Po Kwai.

Li Po Kwai *alias* Li Kan .. *Respondent.*

Evidence—Written instrument—Evidence to prove the secret, at variance with the expressed, intention of parties—Admissibility of—Rule

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stated—Registered deed of absolute sale—Mortgage by purchaser—Evidence by vendor to show that deed was an "elaborate make-believe"—Admissibility—Estoppel.

The cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed, where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended or where the language sought to be explained in evidence is language in an ordinary [illegible]veyancing form not exhaustively accurate but without an actual mis[illegible] of fact. Apart from such cases, however, the general rule is that [illegible]ny written instrument are free from ambiguity in themselves [illegible]al circumstances do not create any doubt or difficulty as to [illegible]ation of the words to claimants under the instrument [illegible]atter to which the instrument relates, such instrument is [illegible]rued according to the strict plain common meaning of the [illegible] and evidence *dehors* the instrument for the purpose of [illegible]ording to the surmised or alleged intention of the parties to [illegible] utterly inadmissible.

In [illegible] the respondent, who was the owner of certain leasehold properties, executed a deed by which, in consideration of a sum of $16,000, the payment of which was acknowledged, he assigned his right, title and interest in the properties in favour of his son and another as joint tenants. The deed contained all the covenants usually inserted in a sale deed. It was duly attested, stamped *ad valorem* on the amount of the purchase money and registered under the Registration Ordinance. On 7th March, 1929, the appellant advanced $25,000 to the son of the respondent on the security of his interest in the undivided moiety of the property, having searched the register at the Land Office and satisfied himself of the sufficiency of the security offered. On the 28th March, 1929, the respondent brought the present suit for a declaration that the mortgage was not binding on the property. He gave evidence to the effect that the deed of assignment was "an elaborate make-believe," that it was not intended to confer any beneficial interest at all on his son, that the other purchaser under the deed was himself under a different name, that the consideration was never paid and that the deed was only executed by him to mark the properties so that in case of his death the properties might be handed to his son later on. It was, however, no part of his case that there was any resulting trust created in his favour.

Held, (*i*) that the evidence of the respondent was in direct contradiction to the express terms of the written instrument and was therefore inadmissible;

(*ii*) that registration being, in terms of the Ordinance, a means whereby the title to immovable property may be easily traced and ascertained, the respondent was, by his registration of the memorial of deed of assignment, estopped as against the appellant who took his mortgage in reliance of that memorial from denying its correctness in any essential particular, apart altogether from any question of fraud or ulterior purpose on the part of the respondent.

Appeal No. 93 of 1931 from the judgment, dated the 28th August, 1930, of the Full Court of the Supreme Court of Hong Kong, affirming an order, dated the 8th April, 1930, by the Supreme Court in its original jurisdiction.

The facts are fully stated in their Lordships' judgment.

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Tsang Chuen v. Li Po Kwai.

John M. Gover, K. C., *Wilfrid M. Hunt* and *C. Shawcross* for appellant.

W. P. Spens, K. C., and *A. Andrewes-Uthwatt* for respondent.

19th July, 1932. Their Lordships' judgment was delivered by

Lord Blanesburgh

LORD BLANESBURGH.—The question at issue on this appeal is whether the respondent has shown a title in himself to the entirety of certain leasehold properties in Hong Kong, freed and discharged from a legal mortgage upon an undivided moiety thereof held by the appellant from Li Nga Ching, [redacted] son of the respondent. In the Courts of H[redacted] respondent has established his claim. The app[redacted] mortgagee has, following deliverances of grea[redacted] been set aside, and he has been ordered to reassign to the respondent freed from his mortgage the undivided moiety in question. The order to that effect made on the 8th April, 1930, by the Supreme Court of Hong Kong in its original jurisdiction was, on appeal, affirmed in the Full Court by its judgment of the 28th August, 1930. This is the mortgagee's appeal therefrom.

The respondent is a Chinaman of position resident in Hong Kong. His dispute with the appellant concerns an undivided moiety of one of three separate parcels of leasehold properties, held under Crown leases for long terms of which in 1912 the respondent became possessed, on the division of his deceased father's estate.

The particular leaseholds the undivided moiety of which is now in question are described in terms both elaborate and identical in a deed of assignment of them of the 9th March, 1917, and in a memorial of that deed duly registered under the Land Registration Ordinance of 1844. For present purposes it will suffice compendiously to describe the properties as Nos 18 and 20, Wing Kut Street, Victoria, Hong Kong, and it will be convenient hereafter to refer to them as the properties in question.

By the deed of the 9th March, 1917, these properties were assigned by the respondent to one Li Kan and to Li Nga Ching already mentioned as joint tenants for the residues of the terms granted by the Crown leases under which they are held at the

apportioned rents adjusted with the Crown. The deed upon the terms of which much in this case will be found to depend is one of purchase and sale. The respondent party to it of the one part and, as such, described throughout as "the vendor," is "Li Hung Cheung *alias* Li Po Kwai of Victoria in Hong Kong, gentleman." The parties to it of [illegible] and as such described throughout as "the pur[illegible]named and described as "Li Kan and Li Nga [illegible] of Victoria aforesaid, gentlemen." The deed [illegible] recital that "the vendor" has agreed with "the [illegible] for the sale to them of the properties in question [illegible] of $16,000. The assignment is expressed to be [illegible]suance of that agreement and in consideration of [illegible]e vendor then paid by the purchasers. The receipt [illegible]000 is acknowledged by the respondent as vendor in [illegible] the deed. It is made also the subject of a separate [illegible]ent signed by the respondent in his vendor name and witnessed by his solicitor. The assignment of the properties in terms extends to all the estate right, title, interest, property claim and demand whatsoever of the vendor in or to the same and the deed contains the usual full covenants for title given on a sale by a vendor to purchasers as also a covenant by the purchasers with the vendor to pay the apportioned rents and perform the covenants in the leases under which the properties in question are held so far as relating to these properties, with a further covenant by them to indemnify the vendor against such rents and covenants.

The respondent in executing the deed signs his vendor name in Chinese characters: the execution signature of "Li Kan" is in English characters. The attesting witness to both executions is the respondent's solicitor.

Li Nga Ching was, as has already been stated, a son of the respondent, but there is nothing either in the deed or anywhere else to suggest the existence of that or of any other relationship between them: nor is there any hint of the fact, for the first time set up in this litigation, that Li Kan, the other "purchaser" is the same person as the vendor. On the contrary the deed is so framed as to represent that the vendor is a separate person from either of the purchasers: that the transaction is an out and out sale and that the vendor, as a result of it has parted with all estate and interest of every kind in the properties

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assigned. In entire accordance with its expressed effect the deed was stamped $80 the *ad valorem* stamp on the stated purchase price.

On the 11th October, 1927, a lease of 20, Wing Kut Street, parcel of the properties in question, was granted by "the purchasers" to a tenant for a term of five Chinese years from the 26th September, 1927, subject to the rent therein mentioned. The lease is expressed to be executed by Li Kan in Chinese characters and by Li Nga Ching in English characters. The deed of assignment had not been executed by Li [illegible] The execution by him of this sub-lease of the 1[illegible] 1927, to anyone perusing the two deeds, manifest[illegible] ance, if any such manifestation were necessary, o[illegible] assignment from which was derived his only sub-le[illegible] in the properties in question. The respondent n[illegible] will be seen, that it was he who executed the lease [illegible] Ching's name and on his behalf.

As already indicated there has been in force in [illegible] since 1844, a system of registration of deeds under [illegible] Registration Ordinance, 1844, and memorials, both of the deed of assignment and of the lease just referred to, were duly registered by the respondent in the register at the Land Office. It will be convenient before considering in detail the terms of these memorials—and more particularly those of the memorial of the assignment—to refer to some of the immediately relevant provisions of the ordinance under which both were registered.

First of all its preamble, in striking contrast with that of the Yorkshire Registry Act of 6 Anne c. 20, from which many of the procedure and other clauses of it have clearly been taken, is in its concluding terms very significant:

"Whereas it is expedient to prevent secret and fraudulent conveyances and to provide means whereby the title to real and immovable property may be easily traced and ascertained."

Section 2 declares that the Land Office shall be a public office for the registration of deeds, conveyances and other instruments in writing, and wills and judgments, and provides for the entry and registration in that office of any of these documents by which any parcels of ground tenements or premises in the colony may be affected. Section 3 (2) provides that any such instruments which are not registered shall (as against any subsequent *bona fide* purchaser or mortgagee for valuable

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his solicitors prior to the institution of these proceedings. It would appear, indeed, that had these deeds been known to the appellant before he took his mortgage, they would have tended to confirm rather than otherwise the complete regularity of the assignment now in question. For it was stated on behalf of the respondent in the Trial Court as a reason for the non-production of the first of the two deeds that the properties comprised therein had since been sold, presumably under the title thereby conferred.

The association of the appellant with the properties in question came about in the following way. He is a banker, a partner in, and in the transaction of mortgage now to be stated, the nominee of the Han Chuen Bank of Victoria, Hong Kong. In March, 1929, he was approached in the ordinary course of business by a mortgage broker with a proposal that he should lend $25,000 for six months to Li Nga Ching on the security of his half-interest in the properties in question. Li Nga Ching may now be conveniently referred to as the mortgagor. The appellant did not know him, nor had he previously heard of the respondent. He himself inspected the properties, was satisfied with the sufficiency of the security offered; was prepared favourably to consider the loan proposal, and he instructed his solicitor to proceed leaving it to him to make all enquiries.

It is matter of admission that, prior to the mortgage which followed, the appellant's solicitor searched the register at the Land Office in reference to the properties in question and that he inspected the registered memorial of the assignment and that he proceeded with the preparation of the mortgage deed and the completion of the transaction of loan as a result of that inspection. He did not see the assignment itself. That he asked for it and was informed that it was in the possession of Li Kan joint tenant with the mortgagor is not improbable in view of his letter later to be mentioned asking Li Kan for a loan of the deeds in order to make copies of them to keep with the mortgage deed. But it is not proved that any such inquiry was made. The solicitor did not give evidence. The fact that he did not do so was a source of real embarrassment to the learned Counsel for the appellant in their argument before the Board. In the view which their Lordships take of the case his non-appearance as a witness is less serious than it might well have been, and it may have seemed to him that his activities

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being to a large extent matters of admission the desirability of a full account from him of what he did was unimportant. It is right to add that no suggestion is made that either the appellant or he had actual notice or any suspicion, when the mortgage was accepted and the advance made, of any defect in the mortgagor's title to an undivided moiety of the properties in question.

The advance of $25,000 was made by the appellant to the mortgagor on the 7th March, 1929. By the mortgage deed of that date, after a recital that the properties in question were vested in Li Kan and the mortgagor for the residues of the terms of years under the said Crown leases, the mortgagor in consideration of the loan assigned the undivided moiety of the property in question to the appellant for the unexpired residues of the terms of years subject to the usual proviso for redemption. A memorial of the mortgage deed was, on its execution, duly registered pursuant to the ordinance.

At the date of its registration there was no entry in the register of any estate or interest in the properties in question being possessed or retained by the respondent; no memorial, indeed of any subsisting interest therein other than that of "the purchasers" under the deed of assignment and of their tenant under the registered lease.

It appears, however, that shortly before this date information had reached the respondent that his sons, or one of them, were attempting to deal with properties standing in their names. The respondent's reaction was to insert in a newspaper what one of the learned Judges describes as a perfectly futile advertisement: he made no warning entry on the register.

On the 11th March, 1929, four days after the advance was made, the appellant's solicitors in a letter addressed to "Mr. Li Kan" at the address of the respondent gave him notice of the mortgage by the mortgagor. The letter proceeded:

> "As our client is informed the title deeds are in your possession we are instructed to request you to lend us the title deeds to enable us to make attested copies thereof to accompany the mortgage to our client.
>
> We shall be glad if you will lend us the title deeds upon the usual understanding."

The reply of the respondent's solicitor of the 14th March is, it must be agreed, a somewhat inapt description of his case as finally made in Court.

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to adopt the language of another jurisdiction, he decreed the respondent's suit.

On appeal by the appellant to the Full Court the trial judgment was affirmed. The learned Judges there, as the learned Trial Judge had done, accepted the respondent's evidence as reliable, but, it would seem, mainly if not exclusively because of their reluctance to interfere, on a pure question of fact, with the finding of a Trial Judge who had seen and heard the witness concerned.

They agreed with the learned Trial Judge's view that the reception of the evidence was permissible to rebut the presumption of advancement while its effect was to disclose the existence of a resulting trust for the respondent. True it might be that neither the appellant nor his solicitor had either notice or suspicion of the existence of such a trust, but their ignorance was the result of gross negligence on the part of the solicitor in not insisting upon the production of the deed of assignment before any advance to the mortgagor was made. The fact that the respondent had always retained that deed in his possession entitled him, as they thought, notwithstanding his registration of the memorial, to assume that no dealings with any property comprised in it would take place without reference to himself. *Kettlewell* v. *Watson*[1] showed that even a system of registration did not dispense an intending purchaser or mortgagee from the duty of inquiring for or examining deeds, memorials of which were registered. Had the application of 11th March, 1929, for inspection of the deed been addressed to the respondent when the loan was only in prospect and not after it had been made, the appellant would have ascertained that the mortgagor had no interest in the properties in question and was not in a position to offer any security whatever over them. *Oliver* v. *Hinton*[2] was the authority in point. The appellant had been guilty of negligence in the transaction so gross that it would be unjust to deprive the respondent's resulting trust of its priority over his subsequently registered mortgage.

The above is a compendious summary of the ruling considerations which led the learned Judges in the Courts below to their conclusions in favour of the respondent. Their Lordships must say at once that they are not prepared to accept the correct-

1. (1884) 26 Ch. Div. 501, 508. 2. (1899) 2 Ch. 264.

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ness of these conclusions nor the soundness of the elaborate reasoning on which they depend. If regard be had, as it must be, to the admitted or accepted facts of the case and to the well-recognised principles of law and equity applicable thereto, the respondent's action must, their Lordships think, necessarily fail. It was because so much depended thereon that they have been at pains in the earlier part of this judgment to examine these facts in their appropriate setting. That examination has satisfied them that the conclusions of the learned Judges can only be reached by ignoring essential principle and by refusing to attribute their proper consequences to the conduct and actions of the respondent, even as avowed in his own evidence which, with a reluctance no less than that of any learned Judge below, their Lordships also accept at its face value.

The outstanding fact disclosed by the examination is that the evidence of the respondent, admitted by both Courts, and essential to support the judgment in each, was evidence which directly contradicted the terms of his own deed. It ought not to have been received at all.

Chief Justice Tindal's statement of the law on this subject in *Shore* v. *Wilsons*[3] has never been departed from. It may be useful to recall his words:

"The general rule," he says, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

These observations apply with peculiar force here. Perhaps the evidence of the respondent tendered and accepted may euphemistically be termed evidence to rebut the presumption of advancement and incidentally establish a resulting trust, but it was in fact tendered to show that the deed of assignment, followed by its attested registration, was an elaborate make-believe with, so far as the operative provisions of the deed were

3. (1839, 1842) 9 Cl. and Fin. 355 at 565.

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concerned, no word of truth in it from beginning to end. There were no purchasers; there had been no sale to anyone; no purchase money had either been paid or received; it was a mere assignment by the respondent to himself. It is unnecessary, however, to dwell on more than one of these contradictions —that which sought to deny the payment and receipt of purchase price acknowledged in the deed by the respondent and attested by his solicitor.

As Sir George Farwell says in *Rimmer* v. *Webster*[4]:

> "If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity,' and he cannot be heard to say that he has not in fact received such purchase money."

It is not, Sir George Farwell goes on to say, as if the purchase money had been paid out of money found by the vendor himself or by some third person, and that fact was being deposed to. The distinction between the two cases is obvious:

> "There is no contradiction of the deed in saying 'True the purchase money was paid by him but out of some third person's money.' There is a direct contradiction in saying that it was never paid at all."

Evidence to that effect was accordingly under Chief Justice Tindal's rule here inadmissible "to establish either a lien for unpaid purchase money or that there was a resulting trust for the" vendor. Indeed it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact. Instances of each of these will be found in *Haigh* v. *Kaye*,[5] *In re Duke of Marlborough*,[6] *Barton* v. *Bank of New South Wales*[7] and *Carritt* v. *Real and Personal Advance Company*.[8] But the

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4. (1902) 2 Ch. 163 at 173.
5. (1872) 7 Ch. 469.
6. (1894) 2 Ch. 133.
7. (1890) 15 App. Cas. 379.
8. (1889) 42 Ch. D. 263.

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present position is that correctly described by Farwell, J., in the recent case of In re *King's Settlement*[9] where he says:

> "If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction, but that the grantees take on a secret trust not disclosed in the conveyance."

And this statement brings into clear relief the respondent's position in these proceedings. If he fails to establish a resulting trust which requires no writing to support it, his claim must fail. He cannot set up an effective express trust against the appellant for at least four reasons. First, no agreement by the mortgagor to be a trustee for him has been established, and the respondent's own evidence negatives the possibility of the existence of such an agreement Secondly, to be valid, that agreement must have been in writing. Thirdly, if it were in wri[illegible] it would, even if known to the appellant, have been of [illegible] against his registered mortgage unless it had been first registered. (*See* Ordinance, S. 4.) Fourthly, such a trust has never been registered. The truth, indeed, is that after the execution of his deed of assignment, the respondent's claim had to be rested on an express declaration of trust by the mortgagor. But such a trust unregistered would have been useless to him as against the appellant. His essential task, accordingly, was to establish a resulting trust, which, in the circumstances, alone could help him. This he has sought to do by evidence inadmissible for its purpose. On this ground alone, therefore, as it seems to their Lordships, the respondent's case must fail. He proves no resulting trust whatever.

But not only on this ground does his case disappear. It fails also because of estoppel. To their Lordships it seems clear that by his registration of the memorial of his deed of assignment the respondent is estopped as against the appellant who took his registered mortgage in reliance on that memorial from denying its correctness in any essential particular. The memorial is a complete statement of the deed of assignment, including therein a statement as to receipt of the purchase price. Its correctness, as required by the ordinance, is duly attested. Its registration is, in terms of the ordinance, a means whereby the title to this immovable property may be easily traced and ascertained. The respondent has been acquitted of any fraudulent

9. (1931) 2 Ch. 294 at 299.

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intent or ulterior purpose in registering it, but his avowed purpose in executing the deed would have been fully attained without any registration at all, and the respondent by the registration of the memorials both of the deed and the lease must be taken, in the absence of any other explanation, to have intended "to produce faith" by such registrations—to adopt a phrase of Fry, L.J. in *Bickerton* v. *Walker*[10]. It is not to be disputed—*Rimmer* v. *Webster*[4] would be authority for the proposition if it were—that if the actual deed of assignment had been produced by the mortgagor to the appellant before he took his mortgage, the respondent would have been estopped from disputing its correctness and the appellant have been relieved of any imputation of negligence had he refrained from inquiry of the respondent as to any rights or claims of his. [illegible]e *Bickerton* v. *Walker*[10].) Their Lordships can see no [illegible]hy the respondent should not have put the appellant [illegible] the same position towards himself, so soon as it is proved or admitted that on the faith of the memorials the appellant advanced his money to the mortgagor. Their Lordships have some difficulty in appreciating the real relevance of the decision in *Kettlewell* v. *Watson*[1] on this point. That was a Yorkshire Registry case, under the statute of Anne and before the law on the subject of registration as regards land in Yorkshire was revolutionised by the Yorkshire Registries Acts, 1884 and 1885. (*See* Dart, Vendors and Purchasers, 7th ed., Vol. I, p. 607.) Lindley, L. J., there said that the registered memorials under the earlier Act gave very little information. He added that the object of the statute of Anne seemed rather to be to let people know what they were to inquire about than to dispense with inquiry respecting deeds and documents, memorials of which are registered—a passage from his judgment already referred to. All of which is, of course, true with reference to that statute. But the statute contained no preamble corresponding to that in the Hong Kong ordinance; it required no memorial in any sense complete. There was, for instance, no obligation to disclose the purchase consideration, and in the memorial in question in *Kettewell* v. *Watson* there was no such disclosure. (*See* 21 Ch. D. at p. 699) nor did the subsequent purchasers or mortgagees there ever inspect the

1. (1882) 21 Ch. D. 685 : (1884) 26 Ch. Div. 501.
4. (1902) 2 Ch. 163.
10. (1885) 31 Ch. Div. 151 at 158, 159.

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register. The memorial accordingly in that case could have worked no estoppel. But Fry, J., in the course of his judgment in *Kettlewell* v. *Watson*[1] indicates how much the facts of the present case would have influenced him:

"The registration of the deed is not notice to all the world of the receipt of the purchase money, because the memorandum registered does not state the receipt for the purchase money, and therefore it appears to me that it cannot interfere with the right of the vendors to the lien which was created by the mere fact of the non-payment of the money."

The learned Judge indicates in that passage not obscurely what his view would have been had he been dealing with a memorial like that in the present case and, in fact, relied upon by the subsequent mortgagee.

On this ground also, in their Lordships' judgment, the respondent's case fails.

But lastly it fails also on a comparison of the cond[illegible] the respondent and the appellant in this matter, [illegible] selected by the Courts below for their decision in fa[illegible] respondent. How first of all may the respondent's cond[illegible] relation to the transaction be described? He placed upon [illegible] register an assignment which he now asserts was no assignment at all. He thereby made a representation which induced the appellant to advance money to his son; he misinformed as to his position all persons searching his title in a public record; and when he heard of attempts by his son to raise money he published a futile advertisement and entered no warning notice on the register. In the face of that catalogue their Lordships have difficulty in following Kemp, C.J., when in his judgment he says that of "the respondent it cannot be said that he did anything which he was under a duty not to do, or that he omitted anything which he was under any duty to do."

And where was the "gross negligence" of the appellant's solicitor? It consisted, so it is said, in not demanding from the mortgagor production of the deed of assignment, a deed quite naturally in the possession of his co-tenant. Now, that the solicitor by refraining from demanding production of the deed exposed his client the appellant to the grave risk of being postponed to some mortgage by deposit made by "the purchasers" after the date of the assignment to them is not after the decision in *Oliver* v. *Hinton*[2] to be gainsaid. But that is not

1. (1882) 21 Ch. D. 685 at 703

2. (1899) 2 Ch. 264.

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the equity which is now being set up by the respondent against the appellant. That was an equity of which the custody of the deeds was a concomitant. The equity here sought to be set up by the respondent is one in no way dependant upon the whereabouts of the deeds: it is an equity upon the existence of which the production of the deed of assignment would cast no light at all. For the protection of the appellant against such a concealed equity as this production of the deed, when a memorial of it had been already considered, would have been of no assistance. The appropriate question for the appellant's solicitor to have asked would have been, not where is the deed of assignment, but whether the respondent had thereby reserved to himself any interest in the properties in question. And why should the solicitor have troubled himself to ask any such question when the possibility of the existence of any such interest was negatived by the terms of the registered memorial of the deed vouched by the respondent himself?

The inquiry as it seems to their Lordships would have been impertinent, and the solicitor cannot be said to have been guilty of any negligence for not having made it. The respondent having put his hand to and registered his deed of assignment was not entitled to suppose that any inquiry with regard to that or any other reserved equity would ever be addressed to him. And the appellant with no notice of that equity has now had assigned to himself for value the legal estate. Between the respondent and the appellant in this matter, so far as the conduct of either is questionable, there is in their Lordships' judgment no room even for comparison.

The judgments in favour of the respondent on this point in the Courts below have been based on what their Lordships cannot help thinking is a misunderstanding of the decision of the Court of Appeal in *Oliver* v. *Hintons*[2]. There the contest in a non-register County was between a person in the position of the appellant and one, not in the position of the respondent, but of a mortgagee from him by deposit made subsequent to the date of his purchase deed. "The defendant has been cheated by Hill, but she has not been in any way cheated by the plaintiff," says Lindley, L.J. In that passage Hill corresponds roughly to the respondent, and the plaintiff to his subsequent mortgagee by deposit. No production of the deeds was

2. (1899) 2 Ch. 264.

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required by the purchasing defendant. The plaintiff was entirely blameless in the matter. On these facts the Court held that the defendant had been guilty of such gross negligence in not asking for the deeds as would render it unjust to deprive the plaintiff who held them of his priority. Their Lordships can see no analogy between that case properly understood and the present. It is not necessary to say that the respondent here was as bad as Hill was there. But it is through the respondent's representations that the appellant has been led to part with his money. That which then was gross negligence in relation to the possibility of a prior equitable charge is not necessarily any negligence at all in relation to the possibility of a resulting trust. It is only of the latter negligence, if any there be, that the respondent can claim the benefit. There is nothing in Lord Lindley's judgment to indicate that the protection which he extended to the entirely blameless mortgagee by deposit he would have thought of extending to the respondent in the present case.

For all these reasons their Lordships are of opinion that this appeal should be allowed: that the judgment of the Full Court of the Supreme Court of Hong Kong of the 28th August, 1930, and the judgment of that Court in its original jurisdiction of the 8th of April, 1930, should both be discharged: and that the respondent's action should be dismissed and with costs in both Courts.

And their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellant his costs of this appeal.

Solicitors for appellant: *Gibson and Weldon.*

Solicitors for respondent: *Sharpe Pritchard & Co.*

S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD BLANESBURGH,. LORD TOMLIN AND SIR LANCELOT SANDERSON.

The Vacuum Oil Company .. *Appellants**

v.

The Secretary of State for India in Council .. *Respondent.*

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Sea Customs Act (VIII of 1878), Ss. 29 and 30—Construction—"Wholesale cash price"—Meaning of—Lubricating oil—Sale to consumers direct—No similar oil in the market—Basis of assessment.

Sections 29 and 30 are sections of a taxing Act not to be pressed against the taxpayer beyond their plain intendment, and taken as a whole, they seem to disclose on the part of the legislature, when describing the price which is to represent the "real value" of the goods to be taxed, a definite purpose to define a price conservative in its every aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The price is to be a price for goods as they are both at the "time" and "place" of importation. The words "wholesale cash price, less trade discount" indicate that only sales to the trade are those in contemplation.

An American company were the manufacturers of a grade of lubricating oil which they imported into India and sold to consumers direct without the intervention of a dealer. The oil was consigned from America upon invoices charging the importing branch with the cost price of the oil f. o. b. New York, plus a small manufacturing profit. The selling price to the consumers was about 70 per cent. above entry price, the selling price being swollen by the retailing profit and charges in respect of matters subsequent to importation There was no other oil on the market "of the like kind and quality". Except for a small discount to those purchasing all their requirements from the company and a special discount for cash, there was no regular trade discount.

Held, that on the true construction of Ss. 29 and 30 of the Sea Customs Act and having regard to the appellants' course of business, the selling price to consumers could not be regarded as "a wholesale cash price" and that the import duty on the lubricating oil should be determined on the alternative basis of assessment indicated in sub-section (*b*) of S. 30.

Vacuum Oil Company v. *Secretary of State,* (1921) I. L. R. 47 Bom. 174, distinguished.

Judgment of the Bombay High Court, Appellate Bench, reported in *Secretary of State* v *Vacuum Oil Company,* (1930) 32 Bom. L. R. 1308, reversed.

Appeal No. 46 of 1931 from a judgment and decree of the High Court, Bombay, dated the 5th August, 1930, allowing the respondent's appeal from the judgment of Mr. Justice Blackwell, dated the 5th April, 1929 and ordering the appellants' action against the respondent to be dismissed with costs.

The substantial question for decision on the appeal was, whether under the Sea Customs Act, 1878, which provides (Ss. 29, 30)

*P. C. Appeal No. 46 of 1931. 21st April, 1932.

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that the basis for the levying of import duties shall be the "real value" upon importation of any goods and that such "real value" shall be "the wholesale cash price less trade discount for which goods of the like kind and quality are sold or are capable of being sold at the time and place of importation," if ascertainable, the Government was justified in taxing the appellants' oils upon the price at which they sold the said oils to actual consumers, or whether under the circumstances of the case the alternative method of valuation provided in sub-clause (*b*) of S. 30 should not operate.

The learned Trial Judge held that the appellants' oils fell to be assessed under S. 30 (*b*), but the Appellate Bench came to the opposite conclusion and gave judgment for the Government.

Sir Albion Richardson, K. C. and *Wilfrid Barton* for appellants.

Dunne, K. C. and *St. John Field* for respondent.

21st April, 1932. Their Lordships' judgment was delivered by

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LORD BLANESBURGH.—The appellants, an American company, with headquarters in New York, are engaged in the manufacture of various grades of oil used in the lubrication of machinery. One of their specialities is an oil known as "Mobiloil" specially manufactured for the lubricating of motor cars. Large quantities of "Mobiloil" are imported into India and are sold by the appellants to retailers in one gallon tins. No question, however, is in these proceedings raised as to any oils so imported and sold. They were the subject of another suit to be referred to later. This case is concerned only with the import duties on the appellants' machinery lubricating oils, including incidentally "Mobiloil" in drums or barrels, which are imported into India through the Port of Bombay and are thereafter sold by the appellants direct to consumers. The dispute is as to the proper basis upon which these imported oils are assessable to duty under the Sea Customs Act, 1878. Since such an issue must ultimately depend upon the true effect of that Act as applied to the oils in question, it will be convenient to set forth at once the material provisions of the sections in point. They are numbered 29 and 30, and are as follows :—

"Section 29.—On the importation into . . . any Customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill-of-entry . . . state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

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"In case of doubt, the Customs-collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information. . . . . .

"Section 30.—For the purposes of this Act the real value shall be deemed to be—

" (*a*) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation . . . without any abatement or deduction whatever, except . . . of the amount of the duties payable on the importation thereof; or

" (*b*) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

Now oil is amongst the "goods subject to duty," the amount of the duty to be charged being made dependent as above appears upon the "real value" of the oil imported. And the contention of Government has been and is that in terms of the Act "the real value" of the appellants' oil is its "wholesale cash price" referred to in S. 30 (*a*), a price ascertainable, so it is said, without difficulty. To this the answer of the appellants is, that in view of the unique character of their machinery oil and of the invariable course of business pursued by them in relation to its sale, a "wholesale cash price" for that oil has never existed and is not ascertainable, and that accordingly its real value must, for the purpose of duty, be determined in accordance with S. 30 (*b*) of the Act involving a result relatively favourable to themselves.

Before 1923 these oils of the appellants had always been assessed at Bombay on the principle so contended for by them. In 1923, however, the Customs' authorities claimed, as their right under the Act, to assess the oils on the basis of their "wholesale cash price," and in due course the action out of which this appeal arises was brought by the appellants to test the validity of that claim. In the proceedings the appellants' complaint has been that on this new and erroneous principle they have been charged with and have been compelled to pay duty in excess of what was lawful. Their claim has been to recover the excess so paid. At the trial the appellants' view prevailed with Blackwell, J., who, sitting as a Judge of First Instance in the High Court of Judicature at Bombay, gave judgment for the appellants by a decree of the 5th

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April, 1929. His decree, however, was on the 5th August, 1930, reversed on appeal by the same High Court, which then dismissed the action. By their present appeal, the appellants seek to have the decree and judgment of Blackwell, J., restored.

Now, as a first step to the solution of the question so at issue, it would be natural to ascertain what, as matter of construction, the statutory expression in debate, "the wholesale cash price" really means or connotes. Only then can it be determined whether it is a price ascertainable in relation to the appellants' imported machinery oils. But the ambiguities of the sections, such as they are, which must ultimately be resolved, will be best exposed if attention is, in the first instance, directed to the position of these oils of the appellants in the Bombay market and to the course of business pursued by them after importation in their sale and disposition.

The facts relating to these matters were carefully found and stated in detail by the learned Trial Judge, and as found by him were accepted by the High Court on appeal and by both sides before the Board.

And, first, with reference to the position of the oils in the Bombay market, the outstanding fact is that imported as they are under the trade description of "Gargoyle," of no other oils can it be said, in Bombay, that using the language of the Act they are of "the like kind and quality". Accordingly, the relevant "wholesale cash price" for the appellants' lubricating oils, if any there be, must be found in the actual sales of these oils in Bombay by the appellants themselves. Have there been any such sales?

It was to the facts in relation to this question that at the trial the learned Judge mainly directed his attention, arriving at conclusions which may be summarised as follows:—

The appellants have a world-wide organisation. In Great Britain, South Africa and Australia they carry on their business through subsidiary companies. In Egypt, India, and the Far East through branches. They have five branches in India; their principal branch is at Bombay. No oil of theirs is introduced into India except through one or other of these five branches. The oil is consigned from American headquarters upon invoices charging the importing branch with the cost price of the oil f.o.b. New York, plus a small manufacturing profit. This is the basis upon which the appellants' oils are shipped to their

subsidiary companies and branches all over the world. The assertion in their plaint that their oils are invoiced on the same basis to independent purchasers outside America was scarcely borne out in evidence, and is not directly pronounced upon by the learned Judge. It may be inferred that he was not satisfied on this point. But the question need not now detain their Lordships, although it will be again referred to. It has not remained a decisive factor in the decision of the appeal.

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The oil of the appellants is imported in barrels, drums and cases: the bulk of it in 42-gallon barrels and drums only a small quantity in cases of two four-gallon tins. In their bills of entry for Bombay the oil is invariably valued by the appellants at its invoice price (arrived at as already stated), plus freight insurance and landing charges. This was the basis of value accepted by the Customs up to March, 1923. It was for the restoration of this basis, and of their assessment on that footing, that the appellants contended in the action.

Upon importation all the oils are transferred to the appellants' warehouses in Bombay. Large stocks are necessary, as their sales from Bombay alone average many million gallons a year. All contracts for sale are made with reference to stocks, and all deliveries are made from stocks replenished from time to time by shipments. No oils are sold ex-ship.

All oils are disposed of direct to consumers, and never to dealers, whether for purposes of re-sale or otherwise. There is a good reason for this practice. It eliminates or reduces the danger of the oils being adulterated before use and so serves to maintain their reputation for quality. The appellants themselves discharge all the functions of retailers of their oil as so sold. They maintain warehouses, offices and staffs, employ salesmen to canvass consumers, advertise, insure their stock, and bear the risk of bad debts. The selling price to consumers is about 70 per cent. above entry price, the selling price being swollen by the appellants' retailing profit and by due provision for these charges in respect of matters subsequent to importation and in character just indicated.

Orders are obtained direct from consumers: the smallest quantity supplied is a case of eight gallons. The selling price is the same whatever be the quantity, large or small, purchased by the consumer. But if a consumer enters into a contract to take all his requirements from the appellants for a year, he is

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entitled to a discount of from $2\frac{1}{2}$ to 15 per cent. according to the quantity purchased in the year. Thirty days' credit is conceded from date of invoice, but a special discount for cash payment within ten days is allowed.

The appellants' oils are delivered by them to buyers in the Island of Bombay, or in other cases free on rail at the station nearest the appellants' warehouse from which they are supplied. The cost of such delivery is included in the sale price.

The appellants are the largest importers into Bombay of lubricating oils. The preponderating quantity so imported is contained and sold in barrels of 42-gallon, or drums of 45-gallon capacity. The amounts purchased by individual consumers are in some cases very large indeed. Further it may be added that although the oils are bought by buyers for their own consumption and are sold on that footing, it does not appear that any enforceable obligation on a buyer results to that effect. It would seem from the evidence, however, that the understanding between the parties on this subject is, in fact, respected and observed.

Such being the appellants' invariable course of business with reference to these imported oils of theirs, the question now to be determined is whether the price charged and received by them therefor, is, within the meaning of the words in S. 30, to give them again in their completeness "a wholesale cash price less trade discount for which goods of the like kind and quality are sold or are capable of being sold at the time and place of importation". The learned Trial Judge held that it was not. In his view the word "wholesale" used as it is in connection with the words "trade discount" and "cash price" indicates a sale to persons in the trade for re-sale and not a sale to a consumer direct: nor, as he thought, do the words "cash price" cover the appellants' sales, which are credit sales.

The High Court, on appeal, took a different view of the Act. The learned Chief Justice of Bombay, who gave the leading judgment, discussing the words of the section separately, held that the preferable meaning to be attached to the term "wholesale price" as therein found was that of a price paid on a sale of a substantial quantity of goods rather than of a price in contrast with a retail price; and when regard was had to the enormous quantities of oil represented by the appellants' sales, and the substantial amount involved in even the smallest of

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them, he thought their sales might properly be regarded as "wholesale". He held further that while the appellants' sales were normally made on a credit of 30 days, there was no difficulty in ascertaining the cash price by deducting from the credit price a discount at the ordinary current rate: and that while the expression "trade discount" did import a discount allowed to the trade, he thought that the Crown was justified in conceding as a deduction from the appellants' list prices an average discount of 12½ per cent., fairly representing the actual discount allowed by the appellants to their customers in their annual accounts. The alternative in the learned Chief Justice's view was to hold not that there being no room for a "trade" discount in the transaction the sale was not one for a wholesale price in terms of the Act at all, but that no discount whatever should be allowed to the appellants who would then be left ...eable with duty on their imported oils at their current list ...ess only a discount for credit given. In his view ...ngly the contentions of Government were well founded ...he action failed. And in all this Baker, J., concurred, ...ough he found in the reported case later to be referred to a ...rther reason for the same conclusion.

Their Lordships are unable to subscribe to these views of the learned Chief Justice. He has only, as they think, been able to reach them by dealing separately with the terms of an enactment which is in its nature composite. He has not availed himself, as an aid to construction, of the light thrown upon each of its expressions by the presence within it of the others. Further in his construction of the words he has, they think, hardly had sufficient regard to the setting in which they are found. In these respects, in their Lordships' view, the method of analysis adopted by the learned Chief Justice is on principle open to objection, and it has resulted in a meaning being attributed to the enactment which is not as they think otherwise obtainable.

Sections 29 and 30 are sections of a taxing Act not to be pressed against the taxpayer beyond their plain intendment, and taken as a whole, as their Lordships read them, they seem to disclose on the part of the legislature when describing the price which is to represent the "real value" of the goods to be taxed a definite purpose to define a price—conservative in its every aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The

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price is to be a price for goods, as they are both at the "time" and "place" of importation. It is to be a "cash price," that is to say, a price free from any augmentation for credit or other advantage allowed to a buyer; it is to be a net price, that is to say, it is a price "less trade discount". And this last expression, supplemented by these other indications, confirms in their Lordships' view the conclusion that the words "wholesale . . . price" are used in the section in contradistinction to a "retail price" and that not only on the ground that such is a well-recognised meaning of the words but because their association with the words "trade discount" indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the word is the "wholesale" price relieved o the loading representing post importation expenses, which, as a matter of business, must always be charged to the consumer and which in the other words of the section already allu are so carefully eliminated. If the question of construc to be determined solely by reason of the presence of th "cash" in the definition their Lordships would have b agreement with the Chief Justice. But that is by no mean case.

Their Lordships accordingly reach the conclusion that in no sense can the price charged to consumers for the machinery oils imported by the appellants be regarded as such "a wholesale cash price" as is described in the Act, nor is it in their judgment possible by further inquiry to extract any such price from any other available material. Indeed the Act as their Lordships read it does not invite any such further inquiry. The wholesale cash price primarily in view is, they cannot doubt, that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles. Their Lordships do not find in the section any sufficient indication that the alternative basis of assessment indicated in S. 30 (*b*) is only to be a "dernier resort". For the great bulk of dutiable goods in their infinite variety it must, they feel satisfied, be the only available basis.

And in their Lordships' judgment it is the basis on which these oils of the appellants must be charged to duty.

This conclusion really disposes of the appeal. For any proved overcharge of duty alleged in the plaint liability is

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itted, and while, if the appellants' oils are to be assessed er S. 30 (*b*), the bills of entry value, for reasons already icated, may not be fully adequate, no other basis of value has this footing been put forward, and to it no objection can in this action be taken. None, indeed, was taken to the acceptance by the learned Trial Judge of that basis of value as the foundation of the relief to the appellants which he decreed and it was the basis accepted by the authorities themselves for many years.

Their Lordships were informed that as a result of some change of procedure, operative as from the 1st April, 1926, the question at issue on this appeal cannot again arise with reference to imports subsequent to that date. But the nature of he change was not explained in detail, and their Lordships :cordingly been careful in terms to confine their judg- the respondent's liability for the actual overpayments y the appellants in their plaint.

Lordships would only further observe that the case of *The Vacuum Oil Co.* v. *The Secretary of State for India*[1] which related to the duty on the "Mobiloil" of the appellants imported and sold to the trade, and upon which such great reliance was placed by the High Court, Baker, J., regarding it as decisive, does not, when properly appreciated, cover the broad question now raised. It is unnecessary, therefore, further to consider it on this occasion.

For these reasons their Lordships are of opinion that the appeal should be allowed: that the decree of the 5th August 1930, should be discharged, and that of the 5th April, 1929, restored.

They will humbly advise His Majesty accordingly.

The respondent must pay the appellants' costs of the appeal to the High Court and of this appeal.

Solicitors for appellants: *Kerly Sons & Karuth.*

Solicitor for respondent: *Solicitor, India Office.*

K. J. R./S. R. *Appeal allowed.*

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1. (1921) I. L. R. 47 Bom. 174.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE CORNISH.

B. Chenchuram Naidu .. *Appellant** (*Plaintiff*)

v.

Muhammad Bahavuddin Sahib .. *Respondent* (*Defendant*).

Chenchuram Naidu *v.* Muhammad Bahavuddin Sahib.

Civil Procedure Code (*V of* 1908), *O.* 23, *r.* 1—*Suit for ejectment of respondent, a tenant, by landlord—Previous suit by landlord against respondent along with another—Suit withdrawn against respondent* [illegible] *applying for leave to file a fresh suit against him—Fresh suit fi*[illegible] *respondent—Suit whether barred.*

Where the appellant, a landlord, sued originally another perso[illegible] present respondent, a tenant, for ejectment and withdrew his suit aga[illegible] present respondent for want of notice to him to quit, without obtainin[illegible] to file a fresh suit against him, and subsequently he filed against him [illegible] respondent) a fresh suit for ejectment, on the question whether the [illegible] suit was barred under O. 23, r. 1 of the Civil Procedure Code as a [illegible] the same 'subject-matter' as the previous one,

Held, that it would be wrong to hold that the suit was barre[illegible] of provisions of O. 23, r. 1.

The series of acts or transactions which formed the basis of the [illegible]ormer suit was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and, therefore, the two suits are not in respect of the same subject-matter.

Rakhmabai v. *Mahadeo Narayan*, (1917) I. L. R. 42 Bom. 155 at 158, relied on.

Appeal against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 376 of 1928.

K. Krishnaswami Aiyangar and *P. V. Venugopala Aiyar* for appellant.

Rafiuddin Ahmed for respondent.

The judgment of the Court was delivered by

Beasley, C.J.

Beasley, C. J.—This was a suit in ejectment. The plaintiff, the appellant here, claimed to be the owner of the suit land and entitled to eject the defendant from the superstructure on it. The learned City Civil Judge dismissed the appellant's suit. A suit had been filed in 1924 in the same Court, O.S. No. 422 of 1924, by the appellant against another person as the 1st defendant and the respondent here as the 2nd defendant to eject them The suit was withdrawn as against the respondent here by the appellant but at the time when he withdrew the suit he did not ask for liberty to file a fresh suit against the respondent. The learned City Civil Judge held that that was a statutory bar to the filing of the suit under appeal

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*C. C. C. Appeal No. 14 of 1929. 26th April, 1932.

against the respondent. Upon that ground he dismissed the suit. He also went into the merits of the case and held that the appellant failed to prove his title and upon that ground also he dismissed the suit.

The first thing we have got to consider here is whether the appellant was prevented from filing the suit under appeal against the respondent by reason of the fact that he withdrew his claim against the respondent in the previous suit without reserving his right to file this suit. That was a suit in which there were two defendants. The 1st defendant was a tenant paying rent to the plaintiff and the respondent was also made a party to the suit. The respondent put in a written statement in which he put the plaintiff to proof of his title and alleged that he had not been given a written notice to quit which was a fact. During the hearing of the case, the appellant withdrew his suit against the respondent thus exonerating him and proceeded with his suit against the 1st defendant. The learned City Civil Judge who tried that suit gives an account of what took place in his judgment as follows:—

"Plaintiff has now exonerated 2nd defendant. The suit against him is accordingly withdrawn, but liberty to litigate his right, if any, in respect of the suit house is reserved to him."

A separate order was passed subsequently some days afterwards and it runs as follows:—

"Plaintiff exonerates 2nd defendant. Suit against 2nd defendant is withdrawn. No costs. 2nd defendant's right to litigate his claim in this house, if any, is reserved to him."

The learned Trial Judge has construed those orders as reserving liberty to the 2nd defendant to litigate his claim and, indeed, that is what the latter of the two orders distinctly says. We have had the advantage also of the statement of Mr. Rafiuddin, who appeared on behalf of the 2nd defendant in that suit and represents the respondent here, who has told us that he asked that this reservation of the 2nd defendant's right should be made and it is quite obvious that it was as a result of that request that the order, to which reference has already been made, was made. We accept what Mr. Rafiuddin had told us and although it does appear to us to have been quite unnecessary to make any reservation of the 2nd defendant's right, however, we are satisfied that that right was reserved at the express request of Mr. Rafiuddin so that the learned Trial Judge's interpretation of those orders is perfectly correct and

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Beasley, C.J.

therefore there was no reservation of liberty to the appellant, the plaintiff in the suit, to file another suit against the respondent. But was such leave necessary? The question here is whether the suit under appeal was a suit for the same "subject-matter" as the previous suit. That, of course, was a suit to eject the respondent and this suit also claims the same relief against the respondent. But it does not necessarily follow that because in an ejectment suit the claim is the same, the statutory bar under O. 23, r. 1 is raised against the appellant. It is argued before us that the reasons why the 2nd defendant was exonerated in the earlier suit was because no written notice to quit had been given to him. On the other side it is argued that it was because of the point raised with regard to the appellant's title It is argued that it was because he was unable to prove his title that he exonerated the respondent. One answer to that is that he proceeded with his suit against the 1st defendant and it was equally important to him to prove his title against the 1st defendant. If he had no title, he could not succeed against the 1st defendant any more than he could against the 2nd defendant. It seems to us to be much more probable that the appellant did not proceed against the respondent here, the 2nd defendant, because he had not given him notice to quit. It was no good going on with the suit against the respondent and succeeding in proving his title if the claim was bound to fail by reason of the defect that he had not given him written notice. What has to be considered here is, what is the meaning of "subject-matter" and we derive great assistance upon this point from *Rakhmabai* v. *Mahadeo Narayan*[1], which seems to us to be directly in point. That was a suit brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under O. 23, r. 1 of the Civil Procedure Code of 1908. It was held that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject-matter as the second suit within the meaning of O. 23, r. 1 of the Civil Procedure Code of 1908, and that " subject-matter " means " the series of acts or

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1. (1917) I. L. R. 42 B. 155.

transactions alleged to exist giving rise to the relief claimed". Scott, C. J., at page 158 says:

"The question is whether the previous suit was a suit for the same subject-matter as the present suit within the meaning of O. 23, r. 1. We are of opinion that 'subject-matter' means, to use the words of O. 1, r. 1 'the series of acts or transactions alleged to exist giving rise to the relief claimed'. Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same subject-matter . . . . . In the first suit between the present parties there was no cause of action because notice had not been given In the present suit there is a cause of action because notice has been given. Therefore, the causes of action are not the same."

With those observations we entirely agree. To hold otherwise would be to place a defendant, against whom an ejectment suit is launched without previously giving him the required written notice and against whom the suit is withdrawn for that reason, in an impregnable position. Never thereafter would the owner of the property be able to eject him from his premises. In fact the tenant would become the owner of the property. That never could have been the intention of O. 23, r. 1. We, therefore, hold that, although the learned Trial Judge was right in his interpretation of his own orders, he was wrong in holding that the suit was barred by reason of the provisions of O. 23, r. 1. We now go on to examine his other findings.

[Examining the Lower Court's finding as regards the title of the appellant to the suit property, their Lordships came to the conclusion that he had absolute title and proceeded]

Under these circumstances, this appeal must be allowed with costs throughout. The further question with regard to valuation will be dealt with in the trial Court.

K. C. *Appeal allowed.*

[FULL BENCH.]

PRESENT :—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, JUSTICE SIR RAMESAM, MR. JUSTICE REILLY, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE SUNDARAM CHETTY.

Lieutenant Srinivasa Rajamani Rajah Deo, the Rajah of Mandasa (dead) and another .. *Petitioners** (*Respondent and his L. R.*)

v.

Senapathi Jagannayakulu and others .. *Respondents* (*Petitioners*).

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Madras Estates Land Act (*I of* 1908), *S.* 172—*Order by Board of Revenue—High Court—Interference in revision—Civil Procedure Code* (*V of* 1908), *S.* 115—*Government of India Act*, 1915 (5 *and* 6 *Geo. V*, *c.* 61), *S.* 107—*Letters Patent* (*Madras*), *S.* 16—*Practice—Full Bench ruling doubted by Division Bench—Reference to "larger" Full Bench—Procedure*

Held, by the Full Bench, Sundaram Chetty, J., dissenting.—The Revenue Officer when making a settlement of rents under Chapter XI of the Madras Estates Land Act is not a Civil Court. So the Board of Revenue, when directing the revision of his proceedings under S. 172, is also not a Civil Court and the High Court cannot, either under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act, revise an order made, or purporting to be made, by the Board of Revenue under S. 172 of the Madras Estates Land Act.

Per Beasley, C. J. and *Reilly, J.*—When a Division Bench doubts the correctness of the ruling of a Full Bench, the proper procedure is to refer the matter to the Chief Justice and it is for him to consider whether the question should be reconsidered by a larger Bench. It is not open to the Division Bench itself to make the reference.

Petition No. 192 of 1926 under Ss. 115 of Act V of 1908 and 107 of the Government of India Act to revise the preliminary order of the Board of Revenue, dated 27th October, 1925, and the final order, dated 17th December, 1925, in B. P. Mis. No. 2783, revising under S. 172 of the Madras Estates Land Act the settlement of rent made by the Special Revenue Officer of Ganjam on 18th August, 1923 and Petition No. 1109 of 1926 under Ss. 115 of Act V of 1908 and 107 of the Government of India Act to revise the proceedings of the Board of Revenue, No. 633, dated 17th March, 1926, in Appeal No. 1 of 1925.

V. V. Srinivasa Aiyangar, S. Varadachariar, K. Bhashyam Aiyangar and *K. Veeraraghavachariar* for petitioners.

B. Jagannadha Das for respondents.

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* C. R. Ps. Nos 192 and 1109 of 1926. 25th November, 1931.

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The Court (*Wallace* and *Tiruvenkata Achariyar, JJ.*) made the following

ORDER OF REFERENCE TO A FULL BENCH. *Wallace, J.*—This Civil Revision Petition is presented against the order of the Board of Revenue revising its own previous decision in a matter of settlement of rent for the purpose of a record-of-rights under Chapter XI of the Madras Estates Land Act. In connection with the preparation of the record-of-rights a Special Revenue Officer settled under section 169 of the Act the rents in 21 villages of the Mandasa Estate. Objections were filed under section 169 against the settlement and disposed of. Appeals were filed under section 171 by the ryots before the Board of Revenue which has been constituted the appellate authority under that section, but they were dismissed as out of time. The ryots petitioned His Excellency the Governor that the settlement should be revised. On that request being forwarded to the Board of Revenue the Board *suo motu* took up the matter on revision under section 172 and has revised rates in favour of the ryots, the result being, we are told, an [illegible]-loss of Rs. 22,000 to the Rajah. It is against that order that the Rajah now moves the High Court in revision.

The first question obviously is whether the High Court has any power of revision over such an order of the Board of Revenue. It is admitted by the petitioner's learned counsel that there is a recent Full Bench decision of this Court directly on this point, the ruling in Civil Revision Petitions Nos. 1027 and 1028 of 1924 pronounced on the 12th of April, 1928. The question referred to that Full Bench was,

> "Has the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act?"

The Full Bench consisted of three Judges, and two of the three learned Judges decided both the points in the negative. The other learned Judge decided that the High Court has limited powers in certain specified cases to interfere in revision with orders under section 205, and he declined to answer the question as to the High Court's powers to revise orders under Chapter XI, as he considered the point did not arise in the litigation which gave rise to the reference. The other two learned Judges agreed that the question of the power of the High Court to revise orders under Chapter XI did not actually arise in the litigation before them but nevertheless decided the point. The petitioner seeks to avoid this finding of the Full Bench on two grounds, first, that it is not a decision as regards the revisional powers of the High Court in the matter of orders under Chapter XI, since a decision on that point was not necessary for the purpose of the litigation before it and since one of the learned Judges declined to decide the point; and secondly, that, even if it is a decision binding on this Bench, the decision requires further consideration than the Full Bench has

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given it. He urges that the matters should therefore be referred to a larger Bench to consider the correctness of the Full Bench decision. Even if I agree that the decision of the Full Bench is *obiter dictum* as regards the High Court's powers of revision of orders under Chapter XI, undoubtedly the decision is entitled to the greatest respect from us, and unless I feel pressed by the other consideration, namely, that the matter does require further consideration, I should not be inclined to direct reference to a fuller Bench but would be content to follow the majority decision on the principle of *stare decisis*. But having heard the matter argued at length I am led to conclude that there is a strong arguable case on both sides, and that the matter does require more consideration from other points of view than have been dealt with by the Full Bench, and that in view of the *obiter* nature of the decision, the refusal of one learned Judge to give a ruling, and the importance of the subject it is desirable that the matter be dealt with by a larger Bench of not less than five Judges. It may b[illegible] that the larger Bench may regard the discussion as to the H[illegible] Court's powers under Chapter XI as inseparable from disc[illegible] as to its powers under section 205, even as the present Full Bench has done, in which case its decision will be applicable to both points though the latter does not directly arise in this litigation.

The questions we have heard argued at the bar are first, whether in the present case there is *prima facie* an illegal or irregular exercise of jurisdiction by the Board of Revenue, which, if the High Court has power, ought to be set aside by it, secondly, whether *prima facie* the High Court has power to interfere in revision with such an order of the Board of Revenue, and thirdly, whether, if so, the decision of the Full Bench should not be referred to a larger Bench for further discussion. I will for convenience in my statement of the case take points 2 and 3 together, and I am endeavouring, since my conclusion is that the whole matter should be fully re-argued before a Full Bench, to limit my discussion here rigidly to the main heads of argument and avoid details.

Before discussing these points I shall deal very shortly with a contention which has been advanced by respondents that this Bench has no power thus to refer a Full Bench decision to a larger Bench. I can see no substance in this objection. The Rules on the Appellate Side permit a Division Bench to refer any matter to a Full Bench, and there are precedents for a Division Bench referring the decision of a Full Bench for consideration by a larger Bench. See *Ramaswami Chettiar* v. *Mallappa Reddiar*[1]. In a somewhat similar case in Rangoon a Bench of that Court adopted a similar procedure. See *K. A. M. Mohideen* v. *Bakshi Ram.*[2]

1. (1920) I.L.R. 43 M. 760: 39 M.L.J. 350 (F.B.).
2. (1925) I.L.R. 3 Rang. 410 (F.B.).

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Point 2.—The answer to the question, whether *prima facie* the High Court has power to interfere in revision with orders of the Board of Revenue under Chapter XI, depends in my view chiefly on a consideration of sections 106 and 107 of the Government of India Act and section 16 of the Letters Patent. The High Court by virtue of section 16 of the Letters Patent is a Court of Appeal (using that word in a wide sense including revision, reference and so on) from Civil Courts in the Presidency and from all other Courts subject to its superintendence. This power is one which is derived from Parliament and cannot be added to or subtracted from by any enactment of a Local Government, but it is subject to the legislative powers of the Governor-General in Council under section 44 of the Letters Patent. The powers of the High Court cannot therefore be affected by any statute passed by the Local Government. Even if such a statute professes to lay down, or example, that a particular tribunal was not a Civil Court or not a Court subject to the superintendence of the High Court it would be of no effect if the High Court itself decided on a consideration of the case that such tribunal was a Civil Court or was a Court subject to the superintendence of the High Court. No doubt in deciding whether or not a particular Court established by the Local Government is or is not under the superintendence of the High Court the High Court would consider the *nature* of the Court as constituted by the Local Government; but the final arbiter as to whether or not it was a Court under the superintendence of the High Court is the High Court and not the Local Government. Hence any contention or conclusion that the Madras Estates Land Act itself does not confer the power of revision on the High Court or even that the Local Government did not intend to confer such powers on the High Court or that under rules framed by the Local Government the Board of Revenue is appointed as the final appellate authority under section 171 or as the final revisional authority under section 172 is neither here nor there. It is for the High Court to decide whether the Board of Revenue in exercising this appellate or revisional power is or is not a Civil Court or a Court subject to the superintendence of the High Court.

The Full Bench has decided that the Board of Revenue in such matters is neither a Civil Court nor a Court subject to the superintendence of the High Court. That decision was vehemently attacked before us and it seems to me there are arguable reasons for holding that the reasons given by the learned concurring Judges as set out by them in their judgments are inadequate to establish that proposition. In discussing whether the Board of Revenue is a Civil Court, *e.g.*, the concurring Judges hold that so far as the term "Civil Court" is concerned the discussion is concluded when they hold that it is not a Civil Court within the meaning of section 3 of the Code of Civil Procedure. I suggest that it certainly has to be further considered whether the phrase "Civil Court," as used in section 16 of the Letters Patent, has any reference to or

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is circumscribed by the definition in the Civil Procedure Code. Section 3 does not profess to be exhaustive of Civil Courts. It merely defines the position of the various Civil Courts in the hierarchy of Courts. Again section 189 of the Estates Land Act does distinguish between Civil Courts and Revenue Courts for certain purposes, but that does not necessarily mean that a Revenue Court is not a species of the genus of "Civil Court". For a definition of a Civil Court generally we cannot do better than the Privy Council case in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] —which, be it noted, is the only pronouncement of the Judicial Committee cited before us—where their Lordships, recognising that the old Civil Procedure Code did distinguish between Civil Courts and Revenue Courts, went on to say:

"It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act. But it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights"

The definitive definition of Civil Courts is therefore not to be found in the Civil Procedure Code, but in the phrase "Courts deciding on purely civil questions between persons seeking their civil rights," and that *prima facie* is the meaning in my view to be attached to the phrase in section 16 of the Letters Patent.

Mr. Justice Phillips no doubt refers to *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] and explains it by saying that the Privy Council held that the High Court had jurisdiction because the High Court had succeeded to the jurisdiction of the Sudder Court which already had jurisdiction over Revenue Courts when the High Court Charter Act came into force. But it must be confessed that that is not the reason given by their Lordships of the Privy Council. The learned Judge has not considered the question whether apart from section 3 of the Civil Procedure Code and apart from the question of superintendence by the High Court the Board of Revenue is, in the exercise of its function now under consideration, a Civil Court, and the petitioner is justified in contending that *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] is a clear ruling in his favour which has not so far been adequately distinguished.

Two methods of interpretation of section 16 of the Letters Patent have been advanced, (1) by the petitioner, that by constituting the High Court a Court of Appeal from all Civil Courts and all other Courts subject to its superintendence, the High Court is thereby empowered to exercise an appellate jurisdiction over such Courts; (2) by the respondents, that the declaration of the High Court as a Court of Appeal does not *ipso facto* carry with it power to exercise appellate jurisdiction over such Courts and that such power can only be conferred by a provision *ad hoc* by statute. To apply these theories to the case of any Court which is a Civil

3. (1882) L.R. 9 I.A. 174. I.L.R. 9 C. 295 at 300 (P.C.).

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Court, in the former view the appellate jurisdiction of the High Court follows the moment it is decided that the Court is a Civil Court, while in the latter view the jurisdiction of the High Court depends on whether the authority constituting the Court also declared expressly or by implication that it was either a Civil Court or under the superintendence of the High Court. The respondents' theoretical contention rests chiefly on the argument that the first part of section 16, declaring that the High Court is a Court of Appeal, merely means that the Legislature cannot declare that any other Court is a Court of Appeal from Civil Courts or from Courts subject to the superintendence of the High Court, and that the phrase "shall exercise appellate jurisdiction" must mean something different from "shall be a Court of Appeal". The distinction they seek to draw is that the phrase "shall exercise appellate jurisdiction" means "shall in fact have conferred on it by statute some power which may be classed under the term appellate jurisdiction". It seems to me however that the "exercise of appellate jurisdiction" relates to the manner or extent of, *i.e.*, the procedure in, the exercise of appellate jurisdiction rather than to the power of exercising it, that is, it is the manner and extent of the exercise of its appellate jurisdiction that are as laid down "by virtue of any laws and regulations now in force". There is this to be said for the respondents' argument that our attention has not been called to any reported case where it has been laid down that the High Court has appellate jurisdiction over another Court on the simple ground that it is a Civil Court *tout seul,* while there are several rulings by learned High Court Judges, wherein they have laboured, even in the case of Courts which are obviously Civil Courts, for example, a Small Cause Court, to find some statutory provision indicating an actual subordination to the High Court or some power in the High Court derived by inheritance at the time of the passing of the Charter Act, in order to decide whether the High Court has appellate jurisdiction or not. For example, *B. C. Chunder and others* v. *S. S. Debea and another*[4] (under the heading "Rulings"), *Pirbhai Kimji* v. *B. B. & C. I. Railway Co.*[5] (referring to the Small Cause Court of Bombay), *Bai Jamna* v. *Bai Jadav,*[6] *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[7] (Land Acquisition Court although only section 115 of the Code of Civil Procedure is really considered there), *Chaitan Patgosi Mahapatra* v. *Kunja Behari Patnaik*[8] and particularly *Chatterjee* v. *Tribedi*[9] and *Allen Bros. & Co.* v. *Bando & Co.*[10] On the other hand a Full Bench of five Judges, the Patna High Court in *Shivnandan Prasad Singh* v. *King-Emperor,*[11] has held that section 27 of the Letters Patent,

4. (1866) 6 W.R. 68. 5. (1871) 8 Bom.H.C.R. 59.
6. (1879) I.L.R. 4 B. 168 (F.B.).
7. (1923) I.L.R. 47 M. 357: 46 M.L.J 209 (F.B)
8. (1911) I.L.R. 38 C. 832. 9. (1921) I.L.R. 49 C. 528.
10. (1922) I.L.R. 49 C. 931. 11. (1918) 3 Pat.L.J. 581 (F.B).

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Calcutta, framed in exactly the same language regarding Criminal Courts as section 16 regarding Civil Courts meant *prima facie* that the High Court exercises appellate jurisdiction over all Criminal Courts unless that power has been expressly taken away by the Governor-General in Council by legislation. And, as already noted, respondents have not been able to adduce any ruling of the Privy Council in favour of the argument. On his side the petitioner argues with force that the constitution of the High Court as a Court of Record with unlimited jurisdiction *ipso facto* creates it as a Court with superintendence over all Civil Courts of limited or inferior jurisdiction. In the words of *Rex* v. *Shoreditch Assessment Committee*: *Morgan*, Ex parte[12]:

> "Subjection to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it."

The petitioner of course has also in his favour the decision of a Bench of this Court in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*,[13] which was overruled by the Full Bench. The contention of the respondents that in order to decide whether the High Court has appellate jurisdiction over a Court, we must embark on a minute search of the statute constituting that Court in order to find some indication however small that the Legislature intended to put the Court under superintendence of the High Court is far-fetched. One would rather deduce that, where the Legislature intended to subordinate a Court to the High Court but does not make it very clear by the statute which creates the Court, the reason is because the provisions of the Letters Patent make it unnecessary to do so. It is in my view certainly open to considerable argument whether the simpler view of the interpretation of section 16 of the Letters Patent suggested by the petitioner is not after all the correct one.

As to which of these two propositions in this general form is correct, and the decision as to the High Court's jurisdiction over the Board of Revenue will mainly turn upon which is correct—the Full Bench has not devoted its attention. There is some discussion no doubt on the point with reference to the case in *Allen Bros. & Co.* v. *Bando & Co*[10] but the Patna case has not at all been mentioned. Both the learned concurring Judges seem to regard the discussion as concluded when they are unable to find any statutory provision in the local Act making the Board of Revenue subordinate to the High Court. But as already observed the intention of the local Legislature cannot deprive the High Court of jurisdiction which it already may possess otherwise.

Another point of attack is that the learned concurring Judges seem to regard the existence of a concurrent power of revision both in the High Court and in the Board of Revenue as an anomaly.

10. (1922) I.L.R. 49 C. 931.
12. (1910) 2 K.B. 859 at 880. 13. (1925) I.L.R. 49 M. 499.

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But a concurrent power of revision is already present in certain provisions of the Criminal Procedure Code. In any case the anomaly is resolved if the High Court is held to be the superior Court of revision.

As to the view that the Board of Revenue in matters of its functions under Chapter XI is a Civil Court within the meaning of the phrase as interpreted in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] it seems to me a great deal can be said in favour of it. The essential purpose of the preparation of the record-of-rights is the settlement of a fair and equitable rent between the landholder and the tenant, a matter which would obviously be ordinarily within the jurisdiction of the ordinary Civil Court if it were not taken away by enactment. Whether or not the actual preparation of the record-of-rights under section 165 is in essence a Civil Court matter may be open to doubt; but the settlement of the rent under section 168 and the consequences of that settlement certainly *prima facie* do appear to be so. In the Act itself such a settlement between the individual tenant and his landlord is definitely recognized to be a matter for decision by a Revenue Court—(*see* sections 25 and 189), and is therefore—by force of *Nilmoni Singh Deo* v. *Taranath Mukerjee's*[3] case, a Civil Court matter. It is difficult to see how such a settlement loses that character when it is made between a group of ryots and the landlord, and difficult to refuse to regard it still as a determination of civil rights. The criterion of whether or not certain proceedings are the proceedings of a Civil Court cannot depend on the number of parties to the proceedings.

If I accept respondents' contention that the Act itself and the rules framed under it may be referred to usefully at all on this part of the discussion, these do not assist. Under the rules framed under section 215, for inquiries into objections which are entertained after the publication of the record-of-rights, the parties are to be arrayed as plaintiff and defendant—*see* rule 15—and by Form No. 6 issued to them they are called upon to produce all their evidence, oral and documentary. If we go to the Act itself, the Civil Court nature of the proceedings seems to me an obvious corrollary of the provisions of sections 178 and 179, which enact that during the pendency of the preparation of the record-of-rights the cognizance of such matters is taken away from the ordinary Civil Courts, and of section 173 which permits a suit in the ordinary Civil Court to set aside a finally determined entry in the record-of-rights. In this way it seems to me that the Legislature recognized these matters to be essentially of a Civil Court nature to be finally determined by the Civil Court itself. The observations of Devadoss, J., in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[13] may be usefully considered also in this connection.

3. (1882) L R. 9 I.A. 174· I.L.R. 9 C. 295 (P.C.).
13. (1925) I.L.R. 49 M. 499.

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It may be argued with much cogency that the mere fact that a portion of the ordinary civil jurisdiction of the Civil Court is taken away by the Local Government and given to a special Court called a Revenue Court does not in the first place deprive that Special Court of its real character as a Civil Court or in the second place deprive the High Court of the jurisdiction vested in it by section 16 of the Letters Patent over such Courts which are merely a species of Civil Courts. I find that this aspect of the problem has not been considered at all by the learned concurring Judges in the Full Bench decision.

If on re-consideration the Full Bench again hold that the Board of Revenue is not a Civil Court in these matters it wo[illegible] of course further have to consider the question whether or n[illegible] is a Court subject to the superintendence of the High Court. The is not a point into which I feel constrained to go at present[illegible] the that need be shown at present is the existence of a *prima* [illegible]ust case for consideration by a larger Bench. I answer my Po[illegible] 3 by saying that I have shown that a *prima facie* case exists.

Point I.—The next question is, assuming that there is a *prima facie* case for fresh consideration, should that fresh consideration be ordered now? In other words, is there a *prima facie* case for the interference of the High Court in revision, if it be held that it has power to interfere. Has the Board of Revenue *prima facie* exercised its jurisdiction illegally or improperly? We have heard Counsel on this point also. The petitioner puts his case on two grounds, first, that no Court has jurisdiction to revise its own decision on appeal and secondly, that section 172 gives the Board no jurisdiction to revise on the merits orders passed in appeal under section 171. On the first ground the respondents contend that the word "revision" here is not used in its ordinary legal sense but has some esoteric meaning peculiar to this Act. This does not seem to me a fruitful line of argument. The word "revision" has a definite legal meaning as distinct from "appeal" on the one hand and from "review" on the other. It means the authority *suo motu* or on motion by party to scrutinize the proceedings of inferior and subordinate tribunals and to correct these if necessary in the interests of justice. It does not ordinarily connote authority to rehear and alter decisions of the revising authority itself. Even the High Court has not got that power. Hence the conferment by section 172 of the power of revision on the Board of Revenue does not to my mind *prima facie* connote authority to rehear cases and alter its own decision, nor does it seem to me that any power of review is what has been conferred by section 172. Further a Court has no inherent power to review except as to matters of clerical or formal errors. It is true that Order 47, Code of Civil Procedure, is not excluded from section 192 of the Estates Land Act. But the present reversal by the Board of Revenue on the merits of its own decision on appeal is not based on any of the grounds set out under Order 47. It is in effect a re-hearing of

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the appeal or rather a hearing of an appeal against its own decision in appeal. Such a power is not inherent in a Court and it is open to grave doubt whether it is possessed by the Board of Revenue when it acts as a Civil Court. The fact that the order revised was of a particular nature, namely, an order dismissing the appeals as out of time, will not suffice to create such a power when it is not conferred by statute.

As to the second ground it is certainly arguable that section 172 as it stands does not contemplate revision by the Board of an appellate order under section 171, since the date of the appellate order is not fixed as a *terminus a quo* for the application of a motion for revision. *Prima facie* then section 172 is not intended to give the Board power to revise orders under section 171, and this is not strange since it may be the Board's own order which is passed under section 171. A decision on this point is very much hampered by the difficulty which, I think, was shared by Counsel on both sides, to reduce to a logical consistency the provisions of sections 165 to 179 of the Estates Land Act. As I read the sections, the scheme seems as follows:—

Section 172, judging from the periods of limitation fixed in it, empowers the Board of Revenue to revise (*a*) the original record-of-rights published under section 165 or (*b*) the record re-published under section 170. I do not forget that section 174 says a note of all decisions under section 171 shall be made in the record-of-rights. But it is also clear from that section that the decisions under section 171 are not to be published; for the final re-publication is under section 170. Section 172 seems to give the Board power to revise only entries in the published or re-published record-of-rights. The language of section 173 (1) might be invoked to indicate that an entry in the settlement record prepared under section 171 shall be incorporated in the record-of-rights finally published under section 170 (3). But such incorporation is not contemplated by section 170 (3) itself, according to which the re-publication does not await the disposal of any appeal under section 171. Section 173 is very difficult to understand. For example, a suit may be filed under it to set aside any entry made under clauses (*d*), (*e*) and (*j*) of section 165. If this is to be taken as it stands, then the suit lies only against the original entry under section 165, and not against any amendments to those entries which may have been made under section 169 as a consequence of objections to them or under section 170 by the confirming authority. Respondents press for this extreme view, but it seems to me to make nonsense of the section. To lay down that a person aggrieved by the entries in the record-of-rights made under sections 168 to 171 may not sue to set these aside but has the wholly barren remedy of suing to set aside the original entries under section 165 seems to me an interpretation of the section so opposed to common sense that it must be wrong, and such an interpretation seems also directly contradictory to the express wording of sections 176 and

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179 which later section clearly implies that a suit lies for the alteration of entries in the record-of-rights of rent settled under sections 168 to 172. Therefore I take it that what a party can sue under section 173 to have set aside are the original entries in the record-of-rights or any amended entries of these which have been incorporated in the record-of-rights, so long of course as these are of the classes set out in sub-sections 3 (*a*) to (*f*). Though it is not too clear that a suit may be filed against an entry in the record-of-rights of an order passed on appeal under section 171, since, as shown, such entry is not an entry incorporated in the record-of-rights when finally published, there are other indications in section 173, notably the fixing of the date of disposal of an appeal under section 171 as a *terminus a quo* for a suit which show that such a suit may lie. A party aggrieved by the order in appeal under section 171 therefore would seem to have a remedy by way of a suit. But that is really only an additional ground for holding that a remedy by way of revision under section 172 is not given. Certainly a right of suit against an order in revision under section 172 is not conferred by section 173.

A curious point is that neither section 174 nor section 203 lays down that orders in revision under section 172 shall form part of the record-of-rights (although on the contrary section 179 seems to imply that it shall and does), nor is the rent settled by such revision to be deemed under section 176 fair and equitable. The respondent tries to explain these lacunæ by suggesting that whole sections of the Bengal Tenancy Act were taken over bodily and that confusion has resulted from making what were mere sub-sections in the Bengal Tenancy Act into independent sections in this Act. I do not regard such a line of argument as legitimate or fruitful, and the fact that the jurisdiction of the Board of Revenue has to be supported by such desperate means is another ground for holding that there is a good *prima facie* case that it does not exist. We have to deal with what the Legislature has put before us and we are not at liberty to turn ourselves into legislative bodies for the purpose of supplying deficiencies in a statute.

Both the learned concurring Judges were, I think, in error in holding that a right of suit lies under section 173 to set aside an order passed under section 172. As the statute stands, section 179 —where curiously enough section 172 is mentioned by the clause "save as provided by section 173"—implies that no suit will lie to alter any order made under section 172, and yet under section 176 rents settled under section 172 are not deemed to have been correctly settled We have the astonishing result that the rent determined in appeal under section 171 is deemed fair and equitable rent, but, if revised under section 172, it is not. It seems to me easier and more sensible to hold that there is no power to revise the rate of rent fixed under section 171 and that such revision as is

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contemplated by section 172 is confined as usual to matters of illegal or irregular exercise of jurisdiction by tribunals subordinate to the Board of Revenue. Otherwise the Board of Revenue has unlimited jurisdiction to fix finally a rate of rent which, while cancelling a rate of rent deemed fair and equitable, is not itself deemed fair and equitable, and, more than that, can defeat the successful party under section 171 by deferring this revision until after the six months for a suit to set aside the order under section 171 has expired. That is what has been done in the present case. If the respondents' arguments prevail, the unsuccessful party under section 171 can move in two ways, by revision on the merits under section 172 or by a suit under section 173, while the successful party may be defeated without remedy by a revision under section 172 after the limitation period for a suit under section 173 has expired.

Another possible view of these sections is that the power of the Board of Revenue under section 172 is restricted to directing a revision in the sense of a re-trial of the whole matter, when within the two years experience has shown that the system introduced was unworkable. That view would explain the anomaly that section 176 does not mention section 172, but, needless to say, the Board of Revenue has not in this case directed such a re-trial.

Whatever the true interpretation of these difficult sections may be, it is at least obvious that there is a fair arguable case on both the grounds urged by the petitioner that the Board of Revenue exceeded its jurisdiction in revising its own order under appeal under section 171. I have therefore come to the conclusion, with some diffidence, but with a real sense that the whole matter requires more consideration than it has had at the hands of the Full Bench, that this case should be referred to a larger Bench for decision of the general question whether the High Court has power to interfere with a decision of the Board of Revenue under Chapter XI of the Estates Land Act. In view also of the difficulty of extracting any coherent procedure out of the provisions of that chapter, I would also refer for the decision of that Bench, if its answer to the first question is that the High Court has such power, the question of fact whether the Board of Revenue has in this particular case exceeded the jurisdiction conferred upon it, and would refer for the final decision of that Bench the entire consideration of the final order to be passed in this case.

Tiruvenkata Achariyar, J.

Tiruvenkata Achariyar, J.—This is a petition preferred under section 107 of the Government of India Act and section 115 of the Civil Procedure Code against an order of the Board of Revenue purporting to be passed under section 172 of the Madras Estates Land Act. The petitioner is the landholder of the Estate of Mandasa which is situate in the Ganjam District; the respondents are the ryots of 21 villages of that estate. On the application of the ryots of the said villages, the Local Government ordered that a survey be made and a record-of-rights be prepared in res-

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pect of those villages. That order was carried out and the final record of such rights was duly published as required by sub-section (2) of section 166. The Local Government then, on the application made to them under section 168 by the said ryots, directed a settlement of the rents of those villages. The Revenue Officer deputed for the purpose after holding an enquiry as directed in sections 168 and 169 passed his final order on 18th August, 1923, settling the rents for the said villages. Against that order the ryots preferred an appeal to the Board of Revenue under section 171. That appeal was dismissed on the ground that it was not preferred within the time prescribed in section 171.

Some time afterwards when His Excellency the Governor was touring in the Ganjam District, a deputation of the ryots waited on him and prayed that the settlement of rents made by the Special Revenue Officer should be revised. Their request was communicated to the Board of Revenue who thereupon proposed to exercise their revisional powers under section 172.

On behalf of the landholder, a preliminary objection was taken that it was not competent to the Board to revise the order in this case. That objection was overruled by Mr. T. Raghavayya, the then Commissioner of Land Revenue and Settlement, by his order, dated 27th October, 1925. The application was then heard on the merits by Mr. MacMichael, the successor in office of Mr. Raghavayya. He came to the conclusion that an all-round reduction of approximately 3 annas in the rupee in the Revenue Officer's rates is called for and by his proceedings, dated 17th December, 1925, he ordered that the rates will accordingly be revised as shown in the annexure to that order.

The revision petition before us has been preferred by the landholder against the aforesaid orders of Mr. Raghavayya and Mr. MacMichael. The respondents have filed a memorandum of cross-objections against the final order of Mr. MacMichael contending that he should have still further reduced the rates of rent.

When the petition came on for hearing, the learned advocate for respondents—ryots—raised a preliminary objection that this Court has no power either under section 107 of the Government of India Act, or section 115 of the Civil Procedure Code, to revise the order of the Board of Revenue passed under section 172 of the Estates Land Act. He contended that this point is concluded by the judgment of the majority in the recent Full Bench case in C. R. Ps. Nos. 1027 and 1028 of 1924 and 301 of 1925 and that it is not competent to us sitting as a Division Bench to differ from the decision of the Full Bench even though we may be disposed to take a different view on the question ourselves.

With reference to this preliminary objection, the petitioner's learned advocate urged that though the question whether the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code, or section 107 of the Government of India Act, has power to revise the orders passed

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by the Board of Revenue under Chapter XI, was also one of the questions referred to the Full Bench, yet that question did not actually arise in the case, as pointed out by all the three learned Judges who constituted the Full Bench, and on that ground one of them declined to express his opinion on that question. The other two learned Judges, no doubt, have expressed their opinion on that question also, but in view of their explicit statement that the question did not arise in the cases before them, their opinion can be considered only as *obiter dicta* and has not the binding force of a decision of a Full Bench.

He further argued that when all the reported cases on the point are considered it will be seen that more Judges of this Court have for different reasons come to the opposite conclusion as regards the powers of this Court to revise the orders of the Board of Revenue and the Subordinate Revenue Officers passed under the Estates Land Act, and the opinion of the majority of the Full Bench even if it were not *obiter dicta* should not preclude us from further considering the question.

There can be hardly any doubt as to the importance of the question and it is certainly desirable in view of the conflict of authorities to have an authoritative pronouncement on it. Not only did that question as to this Court's power to revise orders passed by the Board of Revenue under Chapter XI not arise in that case, but I may also observe that the question which was referred to the Full Bench is too comprehensive in its terms. Chapter XI deals with orders passed relating to two distinct matters, namely, (1) the preparation and final publication of a record-of-rights, and (2) the settlement of rents in respect of the villages or lands to which the record-of-rights relates. These two are distinct matters, though the settlement of rents is also incorporated in the record-of-rights which is finally re-published under sub-section (3) of section 170. In this case we are concerned only with the orders relating to the settlement of rents and not with the entries in the record-of-rights as it stood before settlement of rents was ordered by the Local Government under section 168. There is a material distinction between those entries and the entries relating to the settlement of rents which also are to be incorporated in the record-of-rights as finally re-published. An entry in a record-of-rights as finally published under section 167 is under sub-section (3) of the same section "evidence of the matter referred to in such entry, and shall be presumed to be correct until the contrary is proved." But as regards the rents settled under sections 168 to 171, section 176 enacts that subject to the provisions of section 173, they "shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of this Act," that is, it has the force of a binding adjudication as between the landholder and the ryots concerned. Turning to section 173, it will be seen that any person aggrieved by an entry in a settlement record prepared under sections 168 to 171 and incorporated in a record-of-rights

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finally published under sub-section (3) of section 170 may institute a suit in the Civil Court on any of the grounds specified in sub-section (3) of that section and on no other. The only ground in sub-section (3) of section 173 which may be considered as having a material bearing on the rate of quantum of rent entered in the settlement record as payable for any holding is that the entry made under clause (*e*) of section 165 as to the rent lawfully payable at the time the record-of-rights is prepared is incorrect. Section 168, clause (2) enacts that in settling rents under that section the Revenue Officer shall presume until the contrary is proved the existing rent or rate of rent is fair and equitable. This clause, it will be observed, only reiterates the rule laid down in section 28 of the Act. The existing rent or rate of rent is no doubt the starting point of the investigation for settling a fair and equitable rent and any serious mistake made therein cannot but materially affect the result of that investigation. But although the correctness of such a material entry in the settlement record can be impugned in a suit, the further question as to what is to happen if that entry is shown to be materially incorrect is left untouched by the Act. The decision of the Court declaring what the correct entry under clause (*e*) of section 165 ought to be has to be notified to the Collector of the district and a note of that decision has also to be made in the record-of-rights and is to be considered as part of that record. Nevertheless there is no provision in the Act directing the Revenue Officer or the Collector to revise the rent or rate of rent entered in the settlement record with reference to the correct basis as to the existing rent. Sub-section (4) of section 173 provides only for consequential alterations of the entry as to the fair and equitable rent in the settlement record with reference to the decision of the Civil Court on grounds (*a*) to (*c*) of sub-section (3), wherever there is no such provision with regard to these decisions in (*d*) and (*e*). It seems therefore tolerably clear that the right of suit which is conferred by section 173 does not avail to obtain any modification as regards the rate or amount of rent settled as fair and equitable by the Revenue Officer and the higher appellate authorities and incorporated in the settlement record and that while the entries made in the record-of-rights which do not relate to the settlement of rent may be shown to be incorrect the entries as to the fair and equitable rent made in the settlement record cannot be effectively questioned by a suit and they must be given effect to in settling disputes which may arise as to the rent payable by the ryots to the landholder. It follows that while the preparation and final publication of the record-of-rights under section 167 may be viewed as administrative acts, the settlement of rents under sections 168 to 171 cannot be so viewed. They are in essence judicial acts as they determine with conclusive effect the rights of the landholder as against his tenants in respect of the rents payable by them for their hold-

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ings. The circumstance that in the Full Bench case no question arose under Chapter XI probably accounts for the question with reference to that chapter not being sufficiently specific, and for no separate consideration being given in the Full Bench judgments to the nature of the orders according as they relate to the settlement of rents or to other entries in the record-of-rights. In view of these considerations, we heard arguments on both sides on the questions involved in the case, namely:

(1) Whether the High Court in the exercise of its revisional powers under section 107 of the Government of India Act, or section 115 of the Civil Procedure Code, can revise the order passed by the Board of Revenue in this case purporting to revise the rents settled by the Revenue Officer under section 169;

(2) (*a*) assuming that the above question should be answered in the affirmative, was it competent to the Board of Revenue under section 172 to revise the said order after it had itself dismissed an appeal preferred to it under section 171? and

(*b*) whether the Board itself can revise and modify the rents under section 172 or it has power under that section only to remit the case back to the subordinate authority for revision in accordance with such directions as it may give.

Both these questions were fully argued before us on both sides, and most of the relevant authorities were also referred to. As regards the powers of the High Court to interfere in revision against the orders of the Board of Revenue and other inferior Revenue authorities passed under the Estates Land Act, there is no doubt a conflict of authority, and it is by no means easy to deduce from those cases any general principle easy of application on which the existence of the power is made to depend.

I do not propose to discuss the several cases cited to us as at the conclusion of the arguments we considered that in the present state of the authorities the question should be referred to a Full Bench. I need therefore only indicate the view to which I am inclined upon a consideration of the authorities. In my opinion, the High Court has in the exercise of its powers of superintendence under section 107 of the Government of India Act the power to revise the orders passed by the Revenue Officers and the Board of Revenue under sections 169 to 172 of the Estates Land Act, if those officers and the Board of Revenue should be deemed to be acting judicially and not merely in an administrative capacity in settling a fair and equitable rent. If the Revenue Officer who in the first instance has to settle a fair and equitable rent under sections 168 and 169 is exercising a judicial function and should therefore be regarded as a Court, the superior Revenue authority be it the District Collector or the Board of Revenue to which an appeal lies from the order of the Revenue Officer passed under section 169 and the Board of Revenue which under section 172 is invested with the power of directing the revision of such rents must also be held to be acting judicially when dealing with that question and to be exercising the function of a Court though they are not designated as such. In the view that the Revenue Officer

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and the appellate authorities when exercising their functions under sections 168 to 172 are doing so as Courts which I consider to be the right view, I am also of opinion that they are Civil Courts within the meaning of clause 16 of the Letters Patent.

Section 189 of the Estates Land Act which invests a Collector or other Revenue Officer specially authorized in that behalf with exclusive jurisdiction to hear and determine suits and applications specified in Parts A and B of the Schedule says that they shall act as Revenue Courts as distinguished from Civil Courts, the jurisdiction of which is barred in respect of such suits and applications. Section 5 of the Civil Procedure Code also maintains a similar distinction between Revenue Courts and Civil Courts, Revenue Courts being Courts having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of lands used for agricultural purposes but does not include Civil Courts having original jurisdiction under this Code to try such suits or proceedings of a civil nature. It will be seen that this definition of a Revenue Court concedes that the suits and proceedings which relate to the rent, revenue or profits of land used for agricultural purposes which are to be tried by the Revenue Courts are suits and proceedings of a civil nature which ordinarily would have to be tried by the Civil Courts and that the distinction between Revenue Courts and Civil Courts both in the Estates Land Act and in the Civil Procedure Code is made only to enable the Local Government to prescribe a special procedure for the Revenue Courts differing from that laid down in the Civil Procedure Code for the trial of similar suits and applications by the ordinary Civil Courts. Section 3 of the Civil Procedure Code which declares what Courts are subordinate to the High Court makes no mention of Revenue Courts. It may therefore be open to doubt whether for the purpose of section 115 of the Civil Procedure Code a Revenue Court from whose decisions in suits or other proceedings no appeal lies to any Civil Court can be deemed to be subordinate to the High Court. Such Revenue Courts are placed on a materially different footing from Revenue Courts whose decisions are appealable to the District Courts. If the Appellate or Superior Court is subject to the superintendence of the High Court it would be impossible to contend that the inferior Court is not also subject to its superintendence because it is styled as a Revenue Court. But the question in this case arises with reference to the proceedings of a Revenue Officer from whose decisions no appeal lies to any Civil Court but an appeal lies to a superior Revenue authority and a power of revision is conferred on the Board of Revenue. Therefore it may well be doubted whether such a Court or the superior Revenue Officers who constitute the appellate or revisional authority are Courts subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code. The question has however to be considered with reference to the powers of superintendence vested in the High Courts under section 107 of

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the Government of India Act which re-enacts section 15 of the High Courts Act of 1861. Under section 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. Section 106 which corresponds to section 9 of the High Courts Act enacts (to quote only so much as is necessary):

"The several High Courts are Courts of Record and have such jurisdiction, original and appellate . . . and all such powers and authority over or in relation to the administration of justice as are vested in them by Letters Patent and subject to the provisions of any such Letters Patent all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act."

We have therefore to turn to the Letters Patent to find out what is the appellate jurisdiction which is vested in the High Court. The clause in the Letters Patent relating thereto so far as Civil Courts are concerned is clause 16 which runs thus:

"And We do further ordain that the said High Court of Judicature at Madras shall be a Court of Appeal from the Civil Courts of the Presidency of Madras and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force."

Clause 44 of the Letters Patent ordains

"that all the provisions of these (Our Letters Patent) are subject to the legislative powers of the Governor-General in Council, exercised at meetings held for the purposes of making laws and regulations and also of the Governor-General in cases of emergency under the provisions of an Act of the 24th and 25th years of Our reign (Chapter 67) and may be in all respects amended and altered thereby."

It will be convenient to refer also at this place to the powers of the Indian Legislature in so far as they can affect the jurisdiction of the High Court. Under section 65 of the Government of India Act the Indian Legislature which is the supreme legislature for India has power to make laws for all persons, for all Courts and for all places and things within British India but it has not unless expressly so authorised by Act of Parliament power to make any law repealing or affecting any Act of Parliament passed after the year 1860 and extending to British India or without the previous approval of the Secretary of State in Council abolish any "High Court". Under the High Courts Act of 1861, section 9, the jurisdiction to be conferred on the High Court by Her Majesty's Letters Patent was made expressly subject and without prejudice to the legislative powers in the matters aforesaid of the Governor-General of India in Council. Clause 44 of the Letters Patent to which reference has already been made contains a similar provision. The powers of the Local Legislatures are set out in section 80-A of the Government of India Act. The Local Legislature of any Province has power to make laws for the peace and good government of the country for the time being, constituting its province. Sub-section

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(4) of that section says that it has not the power to make any law affecting any Act of Parliament. So far as the jurisdiction and powers of the High Court for the time being are concerned they rest on the provisions of the Letters Patent which Her Majesty was empowered to issue and on the enactments of the Governor-General in Council who was expressly invested with the authority of amending or altering by legislation all or any of the provisions of the Letters Patent, but no such power was given to the Provincial or Local Legislatures. They have no power to affect the jurisdiction of the High Court in any manner.

Turning now to clause 16 of the Letters Patent it will be seen that the High Court is a Court of Appeal (1) from the Civil Courts in the Presidency, and (2) from all other Courts subject to its superintendence. The first part proceeds on a territorial basis. The High Court is a Court of Appeal over all the Civil Courts (Original and Appellate) which are established within the Presidency. The second part which refers to other Courts must be taken to refer to (1) Courts which though within the Presidency are not Civil Courts, and (2) Civil Courts or other Courts which are not within the Presidency. Confining ourselves to Civil Courts the second part relates to such Courts as are not within the Presidency, and the High Court is declared to be a Court of Appeal over such of those Courts as are subject to its superintendence. Clause 26 contains a similar provision as regards the jurisdiction of the High Court over Criminal Courts. This portion of clauses 16 and 26 is the converse of the enactment in section 107 of the Government of India Act which says "that the High Court has superintendence over all Courts subject to its appellate jurisdiction." Clause 16 further provides that the High Court as a Court of Appeal "shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force". The distinction is here drawn between the status of the High Court as a Court of Appeal from all the Civil Courts in the Presidency and its power to entertain and hear appeals presented to it from the decisions of those Courts. It can exercise that power only in those cases in which by virtue of any law or regulation in force appeals may be preferred to it. But in virtue of its status as a Court of Appeal it has powers of superintendence over all Courts, Civil and Criminal, subject to its appellate jurisdiction, *i.e.*, irrespective of whether appeals as such lie to it or not from the decisions of those Courts. So far as Civil Courts are concerned the High Court has powers of superintendence over every Civil Court situate within the Presidency but as regards any Civil Court not within the Presidency, it has powers of superintendence only when such powers are expressly conferred on it as regards that Court. Such a Court can be brought under the superintendence of the High Court only either by Letters Patent of His Majesty or by the legislative authority of the Governor-General in Council. So far as the local Legislature is concerned it has no power

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to affect the jurisdiction thus conferred on the High Court. It may no doubt create a new Civil Court (Original or Appellate) within the province and if it does so that Court will automatically become subject to the appellate jurisdiction of the High Court in virtue of clause 16 of the Letters Patent and consequently subject to its powers of superintendence under section 107 of the Government of India Act—but it is not competent to the local Legislature in creating such Courts to enact any provisions with a view to affect to any extent the appellate jurisdiction of the High Court over such Courts as provided in clause 16 of the Letters Patent and consequently its power of superintendence under section 107 of the Government of India Act. Such an enactment will be altogether void and of no effect. If authority were needed for this position I would first refer to the following observations of West, J., in *The Collector of Thana* v. *Bhaskar Mahadev Sheth*[14]:

"The jurisdiction of the High Courts rests on the Statute 23 and 24 Vic., c. 101, and the Letters Patent issued under that statute. The legislative power of the Local Government rests on 23 and 24 Vic., c. 67, sections 42 and 43. Under these it cannot interfere with any Act of Parliament. The statute constituting this High Court and the Letters Patent give to the Court such jurisdiction as was possessed by the late Supreme and Sadar Courts, together with a general power of appeal and superintendence over the Civil Courts of the Presidency of Bombay (Letters Patent, clause 16, Statute 24 and 25 Vic., c. 104, sections 9, 15). Any Act, therefore, of the local Legislature which should propose to cut down the jurisdiction, would so far be *ultra vires* and inoperative. But, then, it is to be remembered that this restriction of the one authority by the other relates only to matters of jurisdiction—that is, of the exercise of the judicial function and matters ancillary to this."

But the local Legislature has power to change the substantive law and such legislation does not infringe on the authority of the High Court unless the powers of the latter in dealing with the law when made are affected. In *Mahadaji Govind* v. *Sonu bin Davlata*[15] Sargent, C.J., says as follows:—

"The High Court cannot be deprived of any power vested in it by its Charter over Subordinate Courts by any Act of the Bombay Legislature."

In *Hari* v. *Secretary of State for India*[16] where the question arose with regard to the High Court's power of control and supervision over the Bombay Improvement Trust Board created by an Act of the local Legislature, Jenkins, C.J., observes at page 435 as follows:—

"The first question is whether the tribunal is a Court. If it is, then the local Legislature cannot interfere with the High Court's right of supervision. If it is not a Court, it is merely a body of arbitrators, and there is no appeal to the High Court."

At pages 445 and 446 the learned Chief Justice observed that if the body created is not a Court then the local Legislature cannot confer on the High Court jurisdiction to entertain appeals from

14. (1884) I.L.R. 8 B. 264 at 267.
15. (1872) 9 Bom.H.C.R. 249 at 251.
16. (1903) I.L.R. 27 B. 424.

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its decisions. On the other hand if the Board should be held to be a Court that would have attached the consequence of superintendence by the High Court which it was manifestly intended to avoid. If the Special Revenue Officer who under sections 68 and 69 of the Estates Land Act is invested with authority to settle rents as between a landholder and his ryots and who is enjoined by the rules framed under the Act to observe substantially the same procedure as is laid down for suits in the Civil Procedure Code is to be regarded as a tribunal and not merely as an arbitrator then the result will follow that in the exercise of those functions he becomes subject to the powers of superintendence of the High Court notwithstanding any provision to the contrary in the Estates Land Act.

I may here observe that powers of revision and superintendence are equally with the power of entertaining appeals from the decisions of the Subordinate Courts incidence of appellate jurisdiction and that though the power to entertain appeals is restricted under clauses 16 and 26 of the Letters Patent to those cases in which an appeal to the High Court is allowed by statute the powers of superintendence are not so restricted. They can be exercised in respect of all Courts over which the High Court is a Court of Appeal within the meaning of clauses 16 and 26. The superintending powers of the High Court to which all the Civil Courts in the province are subject, makes all those Courts subordinate to the High Court. Under its superintending powers the main function of the High Court is to see that the inferior tribunal does not either usurp a jurisdiction which it does not possess whether at all or to the extent claimed or refuse to exercise a jurisdiction which it has and ought to exercise or act illegally in the exercise of its jurisdiction. But it is no part of that function to substitute its own opinion for that of the Court superintended, in matters assigned by the Legislature to the cognizance of the latter; that can be done only when a right of appeal is given to it.

I have dealt on this point at some length because in most of the cases cited to us including the recent Full Bench case the question whether the High Court has powers of superintendence over the tribunals or the revenue authorities created by the Estates Land Act for adjudicating on questions relating to the respective rights of landholders and ryots in regard to the latter's holdings has not, as I respectfully think, been considered from the right standpoint, *viz.*, whether the said revenue authorities are judicial tribunals by reason of the jurisdiction conferred on them to determine with conclusive effect the civil rights of the parties concerned and if so whether they do not become subject to the superintending powers of the High Court notwithstanding any provision in the Act to the contrary, but whether the Local Legislature has in the enactment creating the said Courts and authorities maintained or superseded the jurisdiction of the High Court wholly or to any extent. If, as I have shown, it is not competent to the local Legislature either

to confer any jurisdiction on the High Court which it does not otherwise possess or to affect to any extent the exercise by it of jurisdiction which it possesses over all Civil Courts in the Province then a detailed examination of the provisions of the Estates Land Act for the purpose of ascertaining the intention of the local Legislature with regard to the powers exercisable by the High Court over the Courts established under the Madras Estates Land Act is not a helpful enquiry and the only substantial question so far as the point before us is concerned is whether the Revenue Officer in determining a fair and equitable rent under sections 168 and 169 of the Act is acting judicially or merely in an administrative capacity. In the former case his determination of the fair and equitable rent is that of a Court. It was argued that while the Revenue Officers who are entrusted with the trial of suits and proceedings in Parts A and B of the Schedule are styled as Revenue Courts, the Revenue Officer is not so styled in section 168 and therefore he is not a Court. In my opinion it is not the designation of the authority which matters but it is the nature of the functions which he is required to discharge which is the test and they are clearly judicial functions. As regards orders passed by the Revenue Officer under section 169, I think it can admit of little doubt that in hearing and disposing of the objections which may be urged either on behalf of the landholder or on behalf of the ryots to the rent he has settled under section 168, he is deciding on purely civil questions between persons seeking their civil rights and he must therefore be deemed to be acting as a Court His decision on that question is subject to an appeal to a superior Revenue Officer under section 171; and the Board of Revenue may also under section 172 direct the revision of the rent so settled. Under section 176 the rent so settled shall be deemed to have been correctly settled and to be a fair and equitable rent within the meaning of this Act.

It is contended on behalf of the ryots that the settlement of rent under sections 169, 171 or 172 is an administrative and not a judicial act. The question of settling a fair and equitable rent for the ryots' holding arises also under sections 25, 45 and 46 of the Act and under those sections also the Collector or Revenue Officer has to settle in the first instance a fair and equitable rent. Under the Act the Revenue Officer when exercising his function under those sections of settling a fair and equitable rent acts as a Revenue Court (*see* section 189, sub-section (1) and Part B of the Schedule, Nos. 4, 7 and 8). It would be anomalous to hold that the trial of the very same question is a judicial enquiry by a Court under those sections but that it is only an administrative act under section 169 The only arguments advanced in support of that contention are (1) that in sections 168 and 169 the Revenue Officer deals with a group of ryots whereas under the other sections referred to he is dealing with the case of individual ryots, and (2) that section 173 gives a right of suit to a person aggrieved by any entry in a settlement record prepared under sections 168 to

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171. I do not think the first ground is a sound distinction. Section 193 shows that in certain circumstances suits for enhancement and reduction of rents can be brought by a landholder against any number of ryots collectively. Moreover though the settlement of rent in section 169 may relate to an entire village the Revenue Officer will have to decide the objection of each individual ryot so far as his holding is concerned.

As regards the second ground, I have already dealt with the scope of the right of suit conferred by section 173 and shown that it does not avail to obtain any modification as regards the rate or amount of rent settled as fair and equitable by the Revenue Officer and the higher appellate authorities and incorporated in the settlement record. I need only add that an order which is otherwise judicial does not cease to be so merely because its validity may be questioned in a suit. If then the correct view to take is that in exercising his function, under sections 168 and 169, the Revenue Officer is acting as a Court of judicial tribunal that Court is a Civil Court within the meaning of clause 16 of the Letters Patent even though according to the nomenclature of the Estates Land Act it should be called a Revenue Court. This point is, I respectfully think, concluded by the decision of their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee.*[3] In that case their Lordships in overruling the contention that the Courts which were designated as Rent Courts under the Bengal Tenancy Act were not Civil Courts for the purposes of applying the provisions of Act VIII of 1859 observed as follows:—

"It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act and that the Civil Courts referred to in section 77 and the kindred sections mean Civil Courts exercising all the powers of Civil Courts as distinguished from the Rent Courts which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights and whether being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859. It is hardly necessary to refer to those provisions in detail because there is no dispute but that if the Rent Court is a Civil Court within Act VIII of 1859, the Collector has under section 286 the power of transferring his decrees for execution into another district."

In another place in the same judgment referring to the contention based on the definition of the word "judgment" in Act XXXIII of 1852 their Lordships say:

"It is true that in this Act the word 'judgment' means a judgment in a civil suit or proceedings. But suits for the recovery of rent are civil suits or proceedings."

A Rent Court or a Revenue Court is a Court of civil jurisdiction and in virtue of section 141, Civil Procedure Code, the procedure prescribed for suits will apply to proceedings in the Courts which are in the nature of original suits subject of course to any special procedure which may be prescribed for them under the special

3. (1882) L.R. 9 I.A. 174: I.L.R. 9 C. 295 (P.C.).

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enactment applicable to them or under the notifications of the Local Government made under section 5 (1) of the Civil Procedure Code. In the view that the decision of a Revenue Officer settling a fair and equitable rent under section 169 must be deemed to be a decision of a Civil Court it must follow that the decision passed in appeal under section 171 or in revision under section 172 by the Board of Revenue must also be deemed to be a decision of Appellate Civil Court and for the reasons already stated the High Court will have superintendence over the Revenue Board in such cases by force of section 107 of the Government of India Act and clause 16 of the Letters Patent.

I need hardly observe that the conclusions reached by me while in accord with the opinion of Venkatasubba Rao, J. in the Full Bench case are in conflict with the opinions of Phillips and Odgers, JJ. who form the majority in that case. It is pressed on us that as the question whether the orders passed by the Board of Revenue under section 205 of the Act are revisable by the High Court either under section 107 of the Government of India Act or under section 115 of the Civil Procedure Code, directly arose in the cases referred to the Full Bench the opinion of the majority is binding on us as a decision of a Full Bench though it was dissented from by Venkatasubba Rao, J. in that case and it is also opposed to the view taken by Devadoss and Waller, JJ. in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[13] and that (without overruling the opinions of the majority in the Full Bench) it is not possible to come to a different conclusion with regard to the orders passed by the Board of Revenue under section 172 of the Act. I may at once say I agree with the contention that no real distinction can be drawn between the orders passed by the Board of Revenue in the exercise of its revisional powers under section 205 and the orders passed by it under section 172 and that if the opinion of the majority in the Full Bench case is right, that the High Court has no power to revise the orders passed by the Board of Revenue under section 205, the same view must prevail as regards the orders passed by it under section 172. But I respectfully think that the soundness of the view of the majority in the Full Bench case, as regards section 205, is open to question. Both the learned Judges proceed on the view, first, that it is doubtful if the Board of Revenue is a Court at all, even when acting under section 205 and secondly, if it should be held to be a Court because it exercises judicial functions, it is not a Civil Court but a Revenue Court inasmuch as it is in respect of the decision passed by the Revenue Courts constituted under section 189 and in appeal from those decisions by the District Collector that the revisional power under section 205 can be exercised. No doubt section 189 draws a distinction between Revenue Courts and Civil Courts. It enacts that the suits and proceedings in

13. (1925) I.L.R. 49 M. 499.

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Parts A and B of the Schedule are not cognizable by the Civil Courts. But in the Schedule itself appeals lie in the case of some suits and proceedings to the District Court which is a Civil Court and in other cases to the District Collector who is not a Civil Court. It is conceded as it cannot but be that in those cases where the appeal lies to the District Court, the Revenue Court must be held to be subordinate to the High Court inasmuch as the Appellate Court is directly subordinate to the High Court. But it is argued that in those cases where the appeal from the very same Revenue Court lies to the District Collector and from him an appeal or revision lies only to the Board of Revenue, the jurisdiction of the Civil Courts is completely taken away and the Board of Revenue is placed in the same position with regard to those Revenue Courts as the High Court occupies with reference to the Civil Courts and the High Court cannot therefore exercise any supervision over the Board of Revenue in such cases unless the Board of Revenue is expressly declared to be subject to the appellate jurisdiction or to the superintending powers of the High Court. As no such provisions are to be found in the Act, the Board of Revenue even if it is a Court cannot be held to be subject to the revisional powers of the High Court. If the powers of the High Court over the Board of Revenue had to be decided with reference to section 115, Code of Civil Procedure alone, I should think, as I have already stated, that there is much force in this contention. But as regards the powers of the High Court under section 107 of the Government of India Act, it is not in my opinion a correct view. The view that the Revenue Court, constituted under section 189, and the appellate tribunals are not Civil Courts (in the absence of their being made subject to a Civil Court or expressly declared to be Civil Courts) seems to me to be directly opposed to the decision of their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*,[3] and I respectfully think that the view taken by Venkatasubba Rao, J., in his dissenting judgment is the sounder view. The material passage from their Lordships' judgments has already been quoted above. It seems to me with all respect that the expression "Civil Court" in clause 16 of the Letters Patent means a Court which decides a civil question between persons seeking their civil rights as explained by their Lordships in *Nilmoni Singh Deo* v. *Taranath Mukerjee*,[3] and in that view the Board of Revenue which exercises appellate or revisional jurisdiction over those Courts must also be held to be Civil Courts and as such they all equally come under the appellate jurisdiction of the High Court; see also *Veeraswamy* v. *Manager, Pittapur Estate*.[17] It is only if the Board of Revenue cannot be regarded as a Civil Court that it will be a Court under the second part of clause 16 and then it has to be shown that it is made subject to its superintendence. If the decision of that

3. (1882) L.R. 9 I.A. 174 I L R 9 C 295 (P C).
17. (1902) I.L.R. 26 M. 518 at 520.

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question depended upon the provisions of the Estates Land Act, I should be inclined to agree with the majority of the Full Bench. But if as I have shown the local Legislature has no power to affect the jurisdiction of the High Court to any extent, any attempt made in the Estates Land Act to confer powers of superintendence over a Court which is not a Civil Court will be of no avail

I do not therefore consider it necessary to deal with the arguments advanced on both sides with reference to the implications involved in section 192 of the Act as supporting or negativing the position taken up by either side, or the arguments based upon the power to frame rules conferred under section 202 of the Act. For the reasons stated, I am of opinion that the point decided in the Full Bench case should be further considered by a Special Bench. In the case in *Chandra Binode Kundu* v. *Ala Bux Dewan*[18] a similar procedure was adopted The next question which is raised before us is that the order of the Board of Revenue sought to be revised was passed without jurisdiction. This contention is based on the following grounds:—

(1) That under section 172 the Board cannot direct the revision of any entry in the settlement record but it can do so only with regard to the entries in the record-of-rights finally published under section 166.

(2) That the Board cannot revise the decision passed in appeal under section 171.

(3) That the Board has no power under section 172 to direct a revision of its own order passed in an appeal preferred to it regarding the very same matters; and lastly

(4) That under section 172 the Board cannot itself decide and settle what the rent should be, but it has power only to remit the case back to the Lower Court for reconsideration in the light of its directions.

With reference to the aforesaid objections elaborate arguments were addressed to us on both sides based upon the wording of several sections in this part of the Act I may, at once, observe that the drafting of many of the sections referred to is by no means happy and the intention of the Legislature as it may be inferred from one section seems to be repelled by the language of other sections relating to the same subject-matter. For instance, in section 172, under which the Board derives its powers of revision, the reference is only to settlement of rent under section 168 Under section 173 a right of suit is conferred upon the aggrieved party in respect of any entry in the settlement record prepared under sections 168 to 171. The difference in the wording of this section would indicate that the scope of section 173 is wider than that of section 172, as under the former section not only the rents settled under section 168 but also those settled under sections 169, 170

18. (1920) I.L.R. 48 C 184 (S.B.).

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and 171 may also be questioned in a suit. Section 176 enacts that (subject to the provisions of section 173) all rents settled under sections 168 to 170, or settled under section 171 shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of this Act. There is no reference in this section also to any rent settled under section 172, nor is there any reference in section 173 to any rent settled under section 172. It is not easy to understand what the different wordings in the several sections referred to are intended to signify. It has to be said on the other hand that if the Board of Revenue cannot, under section 172, revise the order passed by the Revenue Officer under section 169, or by the confirming authority under section 170, why the starting point for the two years' period within which alone the powers of revision under that section can be exercised by the Revenue Board should be made to run from the date of re-publication of the record-of-rights under sub-section (3) of section 170. Further, while section 172 does not refer to the orders passed under section 171, section 173 refers to section 171 and provides the date of the order passed in appeal under that section as one of the starting points for limitation for a suit under that section. Is it open to the Board to entertain a petition under section 172 when an appeal has been preferred under section 171, and is still pending? If when that appeal is disposed of more than two years have elapsed from the date of final re-publication of the record-of-rights under section 170 can the Board of Revenue revise the appellate decision under section 172? The terms of the section are clear on that point; the power to direct revision cannot be exercised after the expiry of the two years' period I do not think that the Legislature could have intended that a revision petition can be entertained by the Board while an appeal in the very same matter is pending either before it or some other authority. The contrary view may result in conflicting decisions regarding the very same matter being passed by the appellate authority and the revisional authority. It will therefore be proper to assume that the revisional power is to be exercised only if no appeal is preferred or after the appeal is disposed of. But the circumstance that the date of the disposal of the appeal under section 171 is not also one of the starting points for limitation under section 172, as it is under section 173, tends to support the view that the order passed in appeal cannot be revised. In the present case, the appeal was to the Board of Revenue itself and it dismissed the appeal on the ground of limitation with the result that the Revenue Officer's decision stood confirmed. The subsequent action of the Board of Revenue purporting to be taken *suo motu* under section 172 really amounts to the Board reviewing its own judgment. The power to review its own judgment is not inherent in a Court and must be conferred on it by express enactment. In the absence of such a power a Court cannot revise its own judgment. The power which is conferred under section 172 on the Board of Revenue is not a

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power to review its own judgment, but to direct the revision of any entry in the record-of-rights as settled by a subordinate authority. The section does not say on what ground it can direct the revision of any such entry. The revision may presumably be ordered on any ground which it may consider proper, whether it is one of law or of fact, or it merely relates to the exercise of discretion. But the expression "direct the revision" seems to indicate that the Board of Revenue as the revising authority cannot itself pass an order settling the rent as it could do when disposing of an appeal preferred to it, but that it has to remit the case back to the subordinate authority for revision or reconsideration in the light of its order and the actual revision of the rent is to be made by the subordinate authority. In this view the non-mention of section 172 in sections 173 and 176 is explicable as no rent is settled under section 172. If in cases in which an appeal lies to the Board of Revenue and is preferred the Board has also a concurrent power of revision, as contended, can it dismiss the appeal and at the same time exercise the powers of revision? Suppose it had in appeal modified the decision of the subordinate authority to some extent could it thereafter either *suo motu* or on the application of any party exercise its powers of revision and modify the order it had already passed? All these considerations seem to me to go a long way to support the objections taken by the petitioner to the validity of the order sought to be revised.

I think that the question whether the order passed by the Board of Revenue in this case was within its powers under section 172 is a question which, having regard to the difficulties pointed out above as to the right interpretation of that section, may also be referred to the same Bench.

I therefore concur in the order of reference to a Full Bench of this case as proposed by my learned brother.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—The questions referred to us are

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(1) "whether the High Court has power to interfere with a decision of the Board of Revenue under Chapter XI of the Madras Estates Land Act,"

(2) "whether the Board of Revenue has in this particular case exceeded the jurisdiction conferred upon it," and

(3) what should be "the final order to be passed in this case," *i. e*, on this revision petition.

It appears that under S. 164 of the Estates Land Act the Local Government ordered that a survey should be made and a record-of-rights should be prepared for 21 villages in the Mandasa Zamindari in the Ganjam district, which was done On an application made by the ryots of the villages the Local Government afterwards ordered under S. 168 of the Act that a settlement of rent should be made for the villages. The

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Revenue Officer appointed for the purpose settled the rents for the villages. The ryots being dissatisfied, appealed against his orders to the Board of Revenue, which had been appointed by the Local Government to be the appellate authority for the purpose under S. 171 of the Act. Their appeal was dismissed as time-barred. Later on however the Board of Revenue in consequence of representations made on behalf of the ryots to His Excellency the Governor took the matter up in revision, purporting to proceed under S. 172 of the Act, and ordered a general reduction of the rents settled by approximately 3 annas in the rupee. The Zamindar has presented this petition to this Court for the exercise of revisional powers under S. 115 of the Code of Civil Procedure or S. 107 of the Government of India Act in respect of that order of the Board of Revenue.

The petition came on before Wallace and Tiruvenkata Achariyar, JJ., and it was contended before them for the ryots that this Court has no power to revise such an order of the Board of Revenue either under the Code of Civil Procedure or under the Government of India Act. It was not necessary for the ryots to contend that this Court had no power to revise any order made by the Board of Revenue under the Estates Land Act. Their contention was, I understand, that an order made by the Board of Revenue under S. 172 of the Estates Land Act, which is part of Chapter XI of the Act, was not subject to revision by this Court. In *Appanna* v. *Latchayya*[18] Spencer, J., was of opinion that the Board of Revenue, when acting under S. 171 or 172 of the Estates Land Act, was not a Court subject to the revisional jurisdiction of this Court. Devadoss, J., in that case appears to have been of opinion that the Board of Revenue when making an order under S. 171 or 172 of the Estates Land Act was a Court and that its proceedings were subject to revision by this Court. But the learned Judges agreed in disposing of the case before them on another point. In *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[19] Devadoss and Walier, JJ., decided that the High Court had power to revise an order made by the Board of Revenue on appeal under S. 171 of the Estates Land Act, and Devadoss, J , expressed the opinion that the High Court had also power to revise an order made by the Board under S. 172

13 (1925) I. L. R. 49 M 49.
19. (1923) I. L R. 47 M. 250 : 45 ML. J. 735

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of the Act. In *Raghunadha Patro* v. *Govinda Patro*[20] the following question was referred to a Full Bench, *viz.*:—

"Has the High Court in the exercise of its revisional jurisdiction either under S. 115 of the Civil Procedure Code or S 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or S 205 of the Estates Land Act ?"

Phillips and Odgers, JJ., answered the whole question in the negative and so declared that the decision in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[13] was wrong. But the remaining member of the Bench, Venkatasubba Rao, J., declined to answer the question so far as it referred to Chapter XI of the Act, because, as all the learned Judges agreed, that part of the question did not arise in the case in connection with which the reference to the Full Bench had been made. He was of opinion that the Board of Revenue when proceeding under S. 205 of the Estates Land Act was subject to the revisional jurisdiction of this Court. It will be seen that the majority of the Full Bench answered the first question which has been referred to us. But Wallace and Tiruvenkata Achariyar, JJ., refused to be bound by that answer partly because they regarded it as *obiter dictum* and partly because they doubted its correctness. With great respect I do not think the learned Judges were justified in treating the answer given by Phillips and Odgers, JJ., in respect of Chapter XI of the Act as *obiter dictum*. No doubt the members of a Full Bench may in the course of their opinions express *obiter dicta*. And no doubt they may decline to answer part of a question referred to them or one or more of a series of questions, if they think it unnecessary for the purpose of the case out of which the reference has arisen. But, when a question of law has been referred to a Full Bench and the Chief Justice has constituted a Full Bench to answer that question and the Bench or the majority of the Bench has answered the question, in my opinion no Judge sitting alone and no Bench of two Judges is at liberty to disregard that answer or to treat it as not binding on them as if it was an opinion expressed *obiter* in disposing of an ordinary case and unnecessary for the disposal of that case. And perhaps I may also venture to say that the very unusual procedure adopted in this case, by which a Bench of two Judges has referred a question already decided by

13. (1925) I. L. R. 49 M. 499
20. (1928) 55 M. L J. 798 (F. B.).

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a Full Bench to "a larger Bench" than the previous Full Bench because they do not agree with the decision, does not appear to me to be correct. I have no doubt that the Chief Justice of his own motion or on the suggestion of another Judge has power to constitute a larger Full Bench to answer a question already answered by a Full Bench. But it is obvious that there will be something more than inconvenience if a Bench of two Judges can refer a question already decided by a Full Bench to larger and larger Full Benches because they do not agree with the answer or answers already given. However, this perhaps is a matter which would be more properly dealt with by my Lord the Chief Justice.

The first question referred to us is "whether the High Court has power to interfere with a decision of the Board of Revenue under Chapter XI of the Estates Land Act". Interference in that question obviously means interference in revision under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act, and it is in that sense that the question has been argued before us. Under either of those provisions the High Court can interfere in revision only with the proceedings of a Court. If the Board of Revenue in proceeding under any provision of Chapter XI of the Estates Land Act is not acting as a Court of law, then the High Court cannot revise its orders under that chapter of the Act. That is not disputed. We have therefore to decide whether the Board of Revenue when acting under that chapter is a Court of law. We are not concerned with the question whether the Board of Revenue acts as a Court under other provisions of the Act. The only section of Chapter XI which refers explicitly to the Board of Revenue is S. 172, though it appears that the Local Government has appointed the Board of Revenue also to be the appellate authority under S. 171 in some cases, including the "settlement" out of which this reference has arisen. We need not on this occasion trouble ourselves with the distinction between Revenue Courts and other Civil Courts, and in speaking of Civil Courts I shall include Revenue Courts. Chapter XI of the Act deals with the making of a survey or record-of-rights and a settlement of rents. These functions are to be performed by a Revenue Officer. The Board of Revenue acts under the chapter only as the authority which can give orders for the revision of the Revenue Officer's work

under S. 172 of the Act or, if so appointed by the Local Government, as the authority to dispose under S. 171 of appeals against the Revenue Officer's orders made under S. 169 of the chapter. It has been admitted before us—and indeed it cannot be disputed—that the Board of Revenue in exercising these revisional or appellate powers will only be a Court of law, if the Revenue Officer in making the orders so dealt with by the Board is himself a Court of law. If the Revenue Officer acts as a Court, then the Board of Revenue in disposing of appeals from his orders or revising those orders must have been intended by the Legislature to act as a Court. If, on the other hand, the Revenue Officer performs under the chapter only executive or administrative functions, then the authority to dispose of appeals from his orders or to revise them will also perform executive or administrative functions and so will be exempt from the revisional authority of this Court either under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act. The proper way therefore to approach the question before us appears to me to be to examine the functions of the Revenue Officer under the chapter and in particular his functions in the settlement of rent in order to ascertain whether the Legislature intended him in discharging those functions to do so as an executive officer or as a Court. I venture to think that in the cases I have mentioned and in the orders of the referring Judges in this case too little attention has been paid to this aspect of the matter.

In many of his functions under the Act a Revenue Officer acts as a Civil Court. S. 189 provides that he shall hear and determine as a Revenue Court suits and applications of the nature specified in Parts A and B of the Schedule and shuts out the jurisdiction of other Civil Courts in those matters. They include suits to obtain pattas, suits to enforce acceptance of pattas, suits for the recovery of arrears of rent, suits for the enhancement or reduction of money rent or for the commutation of rent in kind and for a variety of other reliefs. It is to be noticed that none of the functions of a Revenue Officer under Chapter XI of the Act is included in Part A or Part B of the Schedule or is referred to in S. 189. The reason becomes apparent when we examine the provisions of Chapter XI. The first section of that chapter provides that the Local Government may order a survey and record-of-rights to be made by a

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Revenue Officer in respect of an estate or portion of an estate (*a*) where the landholder or ryots or not less than half of the total number of landholders or not less than a fourth of the total number of ryots apply for it, or (*b*) where "in the opinion of the Local Government the preparation of such a record is required to secure either the ryots generally or the landholder of an estate or portion of an estate in enjoyment as such of their or his legal rights or is calculated to settle or avoid a serious dispute existing or likely to arise between the ryots generally and their landholder," or (*c*) where the estate is managed by the Government or is under the superintendence of the Court of Wards. It will be seen that the making of a survey and a record-of-rights for the whole area may be ordered when only a quarter of the ryots apply for it or when no one applies for it but the Government thinks it desirable. The making of this order by the Government is clearly an executive matter. S. 165 sets out the particulars, some or all of which must be included in the record-of-rights, the selection of the particulars being left to the Government. Among these particulars are the name of the landholder, the name of the ryot and whether he has occupancy right, the situation, extent and at least one boundary of the land held by the ryot as shown in the survey map, whether the land is irrigated, unirrigated or garden, the rent lawfully payable at the time the record is being prepared and whether it has been permanently fixed, and how the rent has been fixed, whether by decree or under the provisions of the Act or otherwise. The particulars I have mentioned will probably be prescribed for every record-of-rights, as such a record would be of little use without them. S. 166 provides that the Revenue Officer shall prepare a draft record showing the particulars prescribed "after making such inquiry as he sees fit," shall publish the draft, receive and consider any objection to it and after disposing of the objections according to such rules as the Government may prescribe "shall finally frame the record and cause it to be locally published". S. 167 (3) provides that "every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until the contrary is proved". Now in all this the Revenue Officer is not only carrying out the executive orders of the Government but is himself acting as an executive officer. That has not been disputed before us. When the Government

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has ordered him to make the record-of-rights, he must make it and must include in it the prescribed particulars even if neither the landholder nor any ryot appears before him or takes any interest in the proceedings. That concludes the first part of the chapter.

We next come to Ss. 168—171, which deal with the settlement of rent. Here Mr. Varadachariar for the petitioner contends a sudden change comes over the scene: the Revenue Officer, who so far has been no more than an executive official, becomes a Civil Court. S. 168 provides that, if within two months of the final publication of the record-of-rights the landholder or ryots holding not less than a quarter of the extent of the village concerned apply for a settlement of rent and the Local Government so directs, the Revenue Officer "shall settle a fair and equitable rent in respect of the land". Sub-sec. (2) provides that in settling rents he shall presume until the contrary is proved that the existing rent or rate of rent is fair and equitable and shall have regard to the provisions of the Act for determining the rates of rent payable by a ryot. That is the only explicit indication in the Act on what principles he is to make his settlement. There is no definition of "settlement of rent". Wallace, J., in his referring order says that the settlement of a fair and equitable rent is "a matter which would obviously be ordinarily within the jurisdiction of the ordinary Civil Court if it were not taken away by enactment"; and he refers to the remark of their Lordships of the Priviy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] that a Rent Court may be a "Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights". And Tiruvenkata Achariyar, J., has expressed the same opinion. But with respect this appears to me to rest on an entire misconception of what it is which the Revenue Officer does in settling rents. The lawful rent payable by each ryot for his holding and the way in which it has been fixed, by decree or otherwise, he has already entered in the record-of-rights. There would be no object in either the landholder or the ryot asking that he should fix that rent over again. And yet, if either the landholder or the ryot went to a Civil Court in the absence of fair rent legislation or some special provision in this Act, no Court could make a decree for the recovery

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 (P.C.).

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of more than the lawful rent or a declaration for the ryot that less than the lawful rent was due from him. Obviously by the intention and provisions of this section the Revenue Officer is not tied to the lawful rent already established and recorded, but has a duty to fix a fair and equitable rent for each holding. In some cases he may find that the lawful rent already recorded is fair and equitable, and under the section he must presume that it is so; but it is open to him to find that either a higher or a lower rent is fair and equitable and to "settle" that. No Court without special legislation—and there is none outside this Act in force in this Presidency—could give that relief to a landholder or a ryot; and in asking for it neither the landholder nor the ryot would be seeking his civil rights within the words used by their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*,[3] in describing some of the characteristics of a Civil Court. In the Estates Land Act nowhere else is there any provision for such enhancement or reduction or moderation of rents. Under S. 40, when an occupancy ryot pays rent in kind or on the estimated value of part of his crop either the ryot or the landholder may sue to have the re commuted to a money rent. In such a suit no question whethe the lawful rent which is to be commuted is fair or equit-ble can arise. Under S. 30 a landholder may sue any ryot for the enhancement of money rent within certain limits on the ground of a rise of prices or on the ground of an improvement made by the landholder or by the Government or on account of the productive powers of the land having been increased by fluvial action. But he has no cause of action in such a suit on the ground that the lawful rent or share of produce represented by the money rent when that was last fixed was not fair or equitable. Under S. 38 an occupancy ryot who pays a money rent may sue for reduction of rent on the ground of a fall of prices or a permanent deterioration of the land or a permanent failure of water for irrigation. But again no question whether the lawful rent was fair and equitable when its money equivalent was fixed or last fixed can arise. Under S. 42 either the landholder or the ryot may apply to raise or reduce the rent because it is proved that the ryot is in possession of a larger area or a smaller area than that for which he has been paying rent. But again no question whether the lawful rent for the area the ryot

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 (P. C.).

clearly something which no Civil Court could do unless specially empowered.

Next it must be noticed that, apart from the fact that by applying for a settlement of rent the landholder or ryot is often asking for something which no Civil Court could give him. S. 168 provides that the settlement of rent shall be made only "if the Local Government so direct". This does not mean, as was suggested at one stage by Mr. Varadachariar, that the Government is to set up a special temporary Court when required for the disposal of such matters, but that the Executive Government may refuse to have a settlement made at all. The relief which the landholder or the ryots hope to get by such a settlement can be refused by the Executive Government. That being so, how is it possible to regard the relief to be given by this section as a civil right to be sought in a Civil Court?

More important still is it to notice that, if the Government consents and gives the necessary order, the settlement of rents an be made for a whole village, though neither the landholder or more than a quarter of the ryots have applied for it. In hat case as between the remaining three-quarters of the ryots and the landholder the Revenue Officer will have to settle fair and equitable rents at the suit of neither. Here we are far removed from any possible conception of a Civil Court. Not only are those who apply for the settlement seeking something other than their civil rights but the supposed Court is deciding questions between parties neither of whom has sought its aid.

It might perhaps be thought hardly worth while to look further for this supposed Civil Court represented by the settling officer in these provisions. But I may mention several indications in the procedure to be followed which are incompatible with that of a Civil Court. The Revenue Officer has the duty of making the settlement whether any parties appear before him or not, and whether they produce before him any evidence or not. If nobody in the village moves a finger in the matter after the Government has directed that the settlement be made, he must investigate the matter himself. He can use the presumption that the existing rent is fair and equitable; but, if something comes to his notice or is disclosed by his experiments which proves that it is not so, he must proceed on such material as he may find available. If some ryots prove that their rents are inequitable, he cannot refuse to apply the result to other

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similar cases merely because the ryots concerned take no part in the proceedings. And, as the settlement is between each individual ryot and the landholder, it must be remembered that one ryot cannot represent another unless authorized to do so. Under S. 169, when the Revenue Officer has made up his mind what are the fair and equitable rents to be fixed, he must publish a record of his results and wait for objections to be preferred. That is the supposed Civil Judge, as Mr. Varadachariar represents him to be, is to publish a draft judgment and invite objections. If objections are received, he must consider them and modify his judgment in accordance with the results. And under S. 169 (2) he may revise his draft judgment without being moved to do so by any one else. More remarkable still the draft judgment cannot be finally pronounced until it has been submitted under S. 170 to a sanctioning authority. Could anything be more repugnant to ideas of propriety in Civil Courts than that the Judge should have to get the sanction of a confirming authority before pronouncing his own judgment? And under S. 170 (2) the confirming authority may sanction the judgment, which has to be submitted to him with a summary of the objections received, without hearing any of the objectors. The confirming authority, whose sanction gives the judgment validity and who thereby is in a sense himself the Judge, may sit in his office hundreds of miles away and confirm the judgment without giving any of the objectors of whom he is informed any opportunity of being heard. When all this procedure, so foreign to that of any Civil Court, has been completed, the Revenue Officer is finally to pronounce his judgment by incorporating it in the record-of-rights already published, and "the record-of-rights so amended shall be finally re-published." So the end of the work of the supposed Court is that its judgment or decree is incorporated in the record-of-rights, a document admittedly prepared by an executive officer under executive orders. S. 171 provides for an appeal to such authority as the Government may appoint—in this case it happens to be the Board of Revenue—against any order passed by the Revenue Officer on an objection received by him under S. 169. Then we come to S. 172, under which the Board of Revenue may direct the revision of any record-of-rights or any part of a record-of-rights, including the settlement of rents. That section is interesting for our present

purpose, because it makes no distinction between the power or method of the Board in directing the revision of a settlement of rents, which the petitioner represents to be the decree of a Civil Court, and the revision of any other part of the record-of-rights, which is admittedly nothing more than the work of an executive officer. By one stroke of his pen the member of the Board of Revenue in charge can set aside or refuse to set aside the settlement of rents and the rest of the record-of-rights, acting at the same moment according to the contention of the petitioner as a Civil Court of revision and as an executive authority. Is it at all likely that the Legislature intended such an unheard-of combination of functions? Under S. 175 any Revenue Officer specially empowered by the Local Government may correct *bona fide* mistakes in the settlement record made by the settlement officer, an astonishing way of dealing with the record of a Court. And finally at the end of the chapter we find S. 180, which provides for the costs of the proceedings. There is no provision for the payment of costs by a party to his opponent. But there are provisions for the recovery of the cost to the Government corresponding in a way with the Court-fee collected by the Government in a civil suit. But it will be noticed that the Judge of this supposed Civil Court has no voice whatever in deciding who is to pay those costs. It is the Executive Government which decides who is to pay the costs and in what proportions. And the Government may decide that ryots who have taken no part in the proceedings, who have never asked for relief and against whom no relief has been asked, must contribute to the costs. And all costs so imposed by the Government can be recovered as if they were arrears of land revenue. Was ever a Civil Court so treated by the Executive Government?

This examination of the provisions of Chapter XI of the Act shows, I think, that neither in the preparation of the record-of-rights nor in the settlement of rents is the Revenue Officer acting as a Civil Court. The reliefs which can be sought and given in a settlement of rents include reliefs which no Civil Court could grant; they can be refused by order of the Executive Government; they can be imposed between parties neither of whom has moved the supposed Court for any relief; the procedure prescribed is wholly inappropriate to, and in some particulars would be nothing less than scandalous in, a Civil

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Court. I find it impossible to believe that by these provisions the Legislature intended to create a Civil Court of any kind. Such a creation would have been a unique monstrosity—not a kind of Civil Court, but a travesty of a Court. On the other hand, if the work of the settlement officer is done as an executive officer, there is nothing really surprising or unnatural or unreasonable in the procedure prescribed, which provides many safeguards against arbitrary orders.

However it has been urged before us that the settlement of rents involves decisions of great importance between the landholder and the ryots, which undoubtedly affect their civil rights; and it is pointed out that under S. 176 of the Act the rents finally settled "shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of this Act" and so are binding on the parties. It is argued for the petitioner that the rents so settled cannot be contested thereafter in any Civil Court and that it can hardly be supposed that decisions so important, affecting civil rights, should have been entirely excluded at every stage from the jurisdiction of Civil Courts. We are asked to say therefore that, however extraordinarily different from a Civil Court, as we know such Courts, the Revenue Officer may appear in his jurisdiction, duties and procedure when making a settlement of rents, we must treat him as a Civil Court because otherwise these important questions decided by him will never come before a Civil Court at all, a result which it is represented is unthinkable. The contention that the rents finally settled by the Revenue Officer cannot be questioned afterwards by suit in any Civil Court rests on this—S. 176 provides that subject to the provisions of S. 173 the rents so settled shall be deemed to have been correctly settled: S. 173 provides that any person aggrieved by an entry in a settlement record prepared under Ss. 168—171 and incorporated in a record-of-rights finally published may institute a suit in an ordinary Civil Court on certain specified grounds and on no others: that the rent settled has not been correctly settled or is not fair and equitable or has not been correctly entered is not one of those grounds: therefore it is contended that no remedy by suit in a Civil Court is open to a landholder or ryot aggrieved by the rent settled by the Revenue Officer. Personally I am not satisfied that this chain of argument is sound, though I may remark that it happened that both parties before

us took up the position that no suit is available under S. 173 to contest the correctness of any rent settled by the Revenue Officer, and therefore this question was not fully argued before us. But it is worth while to examine the question shortly, as, if the chain of argument is unsound, the petitioner's supposed grievance in being shut out from a Civil Court, if we find, as I have no doubt we must, that the settlement of rents is not the work of a Civil Court, will evaporate. One of the grounds on which a suit under S. 173 may be brought is that an entry made under clause (*e*) of S. 165 is incorrect. There is no other ground mentioned in S. 173 on which the recorded or settled rent of an ordinary ryot's holding can be questioned. S. 165 deals with the particulars to be included in the record-of-rights, which is to be made before any question of settlement of rents arises. Clause (*e*) of S. 165 is "the rent lawfully payable at the time the record is being prepared and whether the ryot is entitled to the benefit of proviso (*a*) to lause (1) of S. 30" (*i.e.*, pays a permanently fixed rent). It s contended that the result of these provisions is that the reord of rent lawfully payable, which is made in the record-of-rights before the settlement of rents is begun, can be questioned by a suit under S. 173, but that the entry of rent finally settled by the Revenue Officer can never be so questioned. That is a very curious result, and it cannot be suggested that any very useful purpose can be served by questioning the lawfully payable rent entered in the record-of-rights after that rent has been superseded by the settled rent, which must thereafter be treated as correct. And it must be remembered that there is no right of suit at all under S. 173, if only a record-of-rights is made but no settlement of rents: it is only after a settlement of rents has been completed that the right of suit under S. 173 arises. Moreover it is only a person who is "aggrieved by an entry in a settlement record prepared under Ss. 168 to 171" who can bring such a suit, and those are the sections which relate to the settlement of rent. And what could aggrieve either a landholder or a ryot more in respect of such a settlement than the settling of a rent which he feels sure he can prove is not fair and equitable? But it is suggested that we are tied to the letter of S. 173, which gives a right of suit in respect of an entry of rent lawfully payable in the record-of-rights but not in respect of the rent finally settled. It appears to me not improbable that there is a misconception here about the mean-

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ing of S. 173. S. 170 provides that, when the settlement of rent has been sanctioned by the confirming authority, the settled rent shall be incorporated in the record-of-rights prepared under the earlier part of the chapter "and the record-of-rights as so amended shall be finally re-published". Does not "so amended" imply that the rent entered as lawfully payable in the record-of-rights as already prepared is struck out and the rent finally settled is substituted for it? If that is the right interpretation, then a suit under S. 173 can be brought on the ground that the entry of the substituted rent is not correct. That interpretation not only gives a reasonable and natural meaning to the opening words of S. 173, but it is supported, I think, by a good many other indications in the Act. In S. 192 (*d*) (*ii*) it is provided that, when a suit is brought for the recovery of rent for any land within an area for which a record-of-rights has been published, the plaint shall contain a statement of the rent of the holding according to the record-of-rights. Now it would be useless for such a suit to show in the plaint the lawful rent entered in the record-of-rights before the settlement of rent but not the settled rent, when rent has been settled, as it is the settled rent which must be taken to be correct and which alone the landlord is entitled to recover. And it will be noticed that there is no suggestion in S. 192 (*d*) (*ii*) that two different rents will be found in the record-of-rights, *viz.*, the lawful rent first entered and the settled rent afterwards entered. The implication is, I think, that there will be only one entry of rent in respect of the holding in the record-of-rights, *viz.*, the lawful rent entered before there is a settlement or, if there has been a settlement, the settled rent which has been substituted for the lawful rent as it previously stood. Under S. 175 the officer empowered to correct mistakes in the settlement officer's orders or decisions under Ss. 168 and 169, that is in settling rents, cannot make a correction so as to affect any decree made under S. 173, which implies that a decree in a suit under S. 173 can affect an order settling rent. And the proviso to S. 175 lays down that no order or decision of the settlement officer shall be so corrected if "an appeal from it" is pending or has been disposed of under S. 173. "Appeal" is apparently used loosely there in the sense in which a claim suit under Order 21, Rule 63 of the Code of Civil Procedure, is sometimes spoken of as in effect an appeal against an order on a claim preferred under Order 21, Rule 58. But the important point is that this

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proviso to S. 175 clearly implies that a suit may be brought to dispute the settlement officer's decision regarding rent made under S. 168 or S. 169. Then S. 176 makes the rent settled final "subject to the provisions of S. 173". And S. 179 provides that no suit shall be brought in any Civil Court "save as provided in S. 173 for the alteration of any entry in such a record of a rent settled under Ss. 168 to 172". If only the entry made under clause (*e*) of S. 165, which is mentioned in S. 173, is understood as the entry amended by the substitution of the settled rent, then all these references to S. 173 become consistent and intelligible, and under sub-sec. (4) of S. 173 the decision what the entry shall be will serve some practical purpose. It cannot be suggested that the words " the rent lawfully payable at the time the record is being prepared," which describe what can be disputed in a suit under S. 173, necessarily exclude the settled rent, because when once settled the settled rent becomes the lawful rent, and, if there is a settlement, " the time the record is being prepared " goes on until the record-of-rights is finally re-published after amendment under S. 170. All this appears to me to make it probable that, with whatever intention the Act was originally drafted, as finally framed it does give both the landholder and the ryot a right to question by a suit under S. 173 in an ordinary Civil Court the correctness of the rent settled by the settlement officer as fair and equitable. However I do not wish to express a definite opinion on this question on the present occasion, as that is unnecessary for this reference and as the question was not fully argued before us. But I am not yet satisfied that, assuming, as Mr. Varadachariar for the petitioner would have us assume, that the Legislature must have intended to make it possible that the important question what rent is due on a particular holding should come before a Civil Court at some stage or other, there is any need for us to twist and torture our ideas of a Civil Court in order to bring within them the Revenue Officer when settling rent under Ss. 168—170 of the Act.

But are we justified in making the assumption I have just mentioned? Why must we assume that the Legislature of the day could not have intended that the settlement of rents under Chapter XI of the Act should be kept entirely outside the jurisdiction of Civil Courts of any kind, Revenue or otherwise? When we are asked to make assumptions about what the Legislature must or cannot have intended, it is not unprofitable

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to remember that the Legislature of the day was in effect only the Executive Government in another guise, a Government which, it cannot be denied, reflected the ideas of revenue history and policy which had been traditional in this Presidency. According to those ideas the rajabhagam which the Zamindar of a permanently settled estate has the right to collect from the ryots represents the traditional Government's share of the produce of the land, which, if there were no Zamindar, would be collected by the Government direct. The Government by the permanent settlement had left the right to collect this rajabhagam to the Zamindar but had not thereby divested itself of the moral obligation to protect the ryot from undue exactions. It was ultimately this theory which underlay that most important feature of the Estates Land Act, the recognition that every ryot in possession of ryoti land other than old waste when the Act came into force had a permanent right of occupancy in his holding as complete as the right of a ryot in a Government ryotwari tract. But occupancy right is of no use to any tenant if there is no limit to the rent which can be exacted from him. The Government was morally bound to protect the ryot in a Zamindari from exaction by the Zamindar or his officials, as it was to protect the ryot in a ryotwari tract from its own subordinate officials. And in regulating the amount of the rajabhagam to be collected the Government might well take power to settle rents in a Zamindari in something the same way in which land revenue is settled in a ryotwari tract and in each case assert its right to make the settlement as something entirely outside the jurisdiction of any Civil Court. We are not concerned on this occasion to discuss the legal basis of that theory, still less its justice or political wisdom. But, if it is asserted that the Government represented by the Legislature of the day, could not have intended to keep the settlement of rents made under Chapter XI of the Act entirely outside the jurisdiction of Civil Courts, that appears to me an entirely unwarranted assumption. To proceed from that assumption to the conclusion that the Legislature therefore must have intended in these provisions for the settlement of rent to create a travesty of a Civil Court with jurisdiction and procedure, not only unlike those of any Civil Court ever heard of, but foreign to the very conception of a Civil Court, is to my mind with all respect fantastic aud unjustifiable.

The question of the High Court's power of revision over orders passed by the Board of Revenue in proceedings under the Estates Land Act other than proceedings under Chapters XI and XII of the Act has been discussed in detail by Venkatasubba Rao, J. in *Raghunadha Patro* v. *Govinda Patro*[20] and by the learned referring Judges in the present order of reference, and I do not think it therefore necessary to go into that question elaborately here, as I agree generally with the views expressed by those learned Judges with reference to this matter.

The extreme view that the High Court has no power of revision, either under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act, over any orders passed by the Board of Revenue under the Madras Estates Land Act is, in my opinion, unsustainable. I very respectfully differ from the opinions of the learned Judges, Phillips and Odgers, JJ., in *Raghunadha Patro* v. *Govinda Patro*[20].

We have accordingly to consider the further question whether such powers of revision exist in respect of orders passed by the Board of Revenue in proceedings under Chapter XI of the Act. As observed by Venkatasubba Rao, J., in *Raghunadha Patro* v. *Govinda Patro*[20] at page 818:

"Whether the Board of Revenue is subordinate to the High Court is not a point to be dealt with in the abstract. The question in each case is, while performing certain specific functions, is it so subordinate? It is for this reason that I wish to stress the point that the character of the Board of Revenue must be separately considered under each of the sections of the Act."

I respectfully agree that that is the standpoint from which the question has to be approached.

I now proceed to consider briefly the provisions of Chapter XI of the Madras Estates Land Act. I may note that Chapter XI provides for two distinct matters—(1) Record-of-rights, and (2) Settlement of rents. So far as record-of-rights is concerned, Ss. 164 to 167 make it clear that the proceeding is really a survey made under the provisions of the Madras Survey and Boundaries Act, though the Local Government is given power to direct that a record be made of the rights and obligations of each ryot and landholder in respect of particular matters specified in the sections. The proceedings consist only in recording the existing state of things including rent lawfully payable at the time, and under S. 167 (3), every entry in a record-of-rights duly published shall be evidence of the matter referred

20. (1928) 55 M. L. J. 798 (F. B.).

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to in such entry and shall be presumed to be correct until the contrary is proved. The record is only a presumptive piece of evidence when the question arises for decision subsequently, and it is open to the parties interested to show that the entry is incorrect. It was decided in *Avasarala Venkata Hanumantha Rao* v. *Achanna*[25] that a Revenue Officer preparing a record-of-rights under Ss. 164 to 167 of the Madras Estates Land Act is only an executive officer discharging the function of Government and is not a Court within the meaning of S. 476 of the Code of Criminal Procedure.

The question as to what is the exact legal nature of the proceedings relating to "settlement of rents" under Ss. 168, etc., of Chapter XI, is by no means an easy one to answer.

It would be convenient first to consider the main provisions relating to settlement of rents contained in that chapter.

Within two months from the date of the final publication of the record-of-rights under S. 166 either the landholder or a specified proportion of the ryots may apply for a settlement of the rents; but it is only if the Local Government so direct that the Revenue Officer should settle the rents. The Revenue Officer should settle "a fair and equitable rent" in respect of the land. He shall presume that the existing rent is fair and equitable and shall have regard to the provisions of the Act for determining the rate of rent payable by a ryot. It is open to the Revenue Officer to propose to the parties such rent or rate of rent as he considers fair and equitable, and if accepted by the parties the same may be recorded as the fair and equitable rent and shall be deemed to have been duly settled under the Act. Even when parties agree among themselves by compromise or otherwise as to the amount of the rent, the Revenue Officer should satisfy himself that the amount agreed upon is fair and equitable, and if so satisfied—but not otherwise—, he should record the amount so agreed upon as the fair and equitable rent; otherwise he has himself to settle a fair and equitable rent (S. 168).

Parties interested could file objections to any entry in the preliminary settlement record that may be prepared by the Revenue Officer. The objections should be disposed of according to the rules which the Local Government may prescribe, and the Revenue Officer may of his own motion, or on the

25. (1915) 28 M. L. J. 123.

application of any party aggrieved—at any time before the record is submitted to the confirming authority—revise any rent entered therein, after giving reasonable notice to the parties concerned (S. 169).

The settlement record should be submitted by the Revenue Officer to the "confirming authority" appointed by the Local Government, with a full statement of the grounds of his proposals and a summary of the objections, if any, which he has received. The "confirming authority" may sanction the settlement with or without amendment, or may return it for revision, provided that no entry shall be amended or omission supplied until reasonable notice has been given to the parties concerned to appear and be heard in the matter. After it has been sanctioned by the "confirming authority," the settlement record shall be incorporated in the record-of-rights published under S. 166, and the record-of-rights as so amended shall be finally published (S. 170).

An appeal shall lie from every order passed by a Revenue Officer on any objection made under S. 169 to such superior revenue authority as the Local Government may prescribe or to an officer specially empowered by the Local Government in this behalf (S. 171).

The Board of Revenue may, in any case, on application, or, of its own motion, direct the revision of any record-of-rights or any portion thereof at any time within two years from the date of the final publication under sub-sec. (2) of S. 166, and in case of settlement of rent, within two years from the date of re-publication under S. 170, provided that no such direction shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter (S. 172).

Under S. 173, a right of suit in the Civil Court is given with reference to specific matters. Such suit may be instituted on any of the grounds specified in clauses (*a*) to (*f*), and on no others. Sub-sec. (4) mentions the reliefs which the Civil Courts could grant in such suits.

Section 174 directs that a note of all the decisions passed on appeal under S. 171, and of all the decrees passed by Civil Courts under S. 173, shall be made in the amalgamated record-of-rights. Correction of *bona fide* mistakes, whether made by the Revenue Officer or by any other Revenue Officer not

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superior in grade to himself, could be made within 12 months on application or of his own motion (S. 175).

Section 176 is important. It enacts "subject to the provisions of S. 173, all rents settled under Ss. 168 to 170 and entered in a record-of-rights finally published under S. 166 or settled under S. 177 shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of this Act." Any rent settled under the chapter shall not thereafter be enhanced for a period of 20 years, except on grounds specified in S. 177. When an application for settlement of rents has been made, no suit or proceeding shall be commenced or continued in any Civil or Revenue Court under Ss. 30, 38 and 40 till after the final publication of the record-of-rights under S. 170; nor could any Civil or Revenue Court entertain or proceed with any suit or application for the alteration of the rent in the area to which the record-of-rights applies till after the final publication of such record-of-rights (S. 178).

No suit shall lie in any Civil Court for "the alteration of any entry in a record of a rent settled under Ss. 168 to 172, save as otherwise provided in S. 173". Certain declaratory suits are saved by S. 179. Power is given to the Local Government regarding the apportionment of expenses incurred by the Government in carrying out the provisions of the chapter, and the Revenue Officer has no right or duty in that matter.

Rules have been framed by the Local Government under Ss. 169 and 215 of the Act.

Rule 1.—Every Revenue Officer appointed for making a record-of-rights or a settlement of rents is invested with all the powers exercised by a Civil Court in the trial of suits.

2. The proceeding shall be summary and shall be governed, so far as may be practicable, by the provisions of the Code of Civil Procedure, having regard to—

(*a*) the issue and service of summons;
(*b*) the examination of parties and witnesses;
(*c*) the production of documents.

Rule 13 provides for production of evidence in support of objections to an entry in the record-of-rights. R. 16 relates to applications for settlement of rents. Under R. 17, the Revenue Officer is to publish a notice by beat of drum, etc., setting forth that the Revenue Officer will proceed to settle fair rents in

respect of *the lands in the said village.* Notice need not be affixed to the holding of each pattadar or ryot, nor served personally on the ryots.

Under R. 18, in preparing the preliminary rent roll, and in giving such particulars as the Local Government may specify, attention should be paid to the condition of the land, nature of the soil, the prevailing rates of rent both in the village under settlement and in the adjoining villages, and to the provisions of Chapter III of the Act.

Under R. 19, when objections are made, notice should be given to the parties interested and the Revenue Officer should inquire into the objections and dispose of the same. The Revenue Officer may carry on his proceedings *ex parte* if he be satisfied that notice of the objection has been duly served upon the absent individuals. The Collector of the district is constituted the confirming authority of the settlement record under S. 170 of the Act (Rule 20).

Appeals against the decision of the Revenue Officer lie to the Board of Revenue. Provision is made by R. 22 to allow enhancement of rent to be spread over a number of years in particular cases.

Certain forms are provided by the Rules:—

Form 8 prescribes the notice to persons interested to attend at the place and time specified, giving intimation to the persons concerned that the Revenue Officer, or *a duly authorized subordinate of his*, will proceed to fix fair and equitable rents for all the lands of the village.

Form 10 relates to notice to individual ryots giving details of rent proposed for the holdings in the name of each ryot.

There is no doubt *some* resemblance between the settlement of the rents under Chapter XI of the Act, and proceedings taken under S. 30 (enhancement of rent by suit), S. 38 (reduction of rent by suit), and S. 40 (commutation of rent payable in kind by suit). But it seems to me on a careful examination of the provisions of Chapter XI of the Act, that there is no real analogy between the essential nature of the proceedings taken under Ss. 30, 38 and 40 of the Act on the one hand, and those taken under the provisions of Chapter XI on the other. Suits under Ss. 30, 38 and 40 are tried by the Revenue Court and could be carried to the District Court on appeal and to the High

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Court on second appeal—*see* Part A of the Schedule attached to the Estates Land Act. Courts are bound by the specific rules mentioned in Ss. 30, 38 and 40 in deciding those suits. Those suits have to be decided on legal evidence placed by the parties before the Courts. In fact, they are judicial decisions passed by Courts in accordance with law and based on legal evidence. Rights of parties are defined and Courts' power is restricted by the directions contained in those sections. The case seems to me to be entirely different in the case of a settlement of rents under Chapter XI. The Revenue Officer settling the rents under Chapter XI is no doubt to presume, until the contrary is proved, that the existing rent or rate of rent is fair and equitable, and he shall have *"regard"* to the provisions of the Act for determining the rates of rent payable by a ryot. But under R. 18 attention should be paid to the condition of land, the nature of the soil, the prevailing rates of rent both in the village under settlement and in the adjoining villages, and to the provisions of Chapter III of the Act. In fact, very much is left to the executive and revenue experience of the officer concerned in determining what is to be the fair and equitable rent. While he shall have regard to the provisions of the Act in determining the rates of rent payable by a ryot, he is entitled to travel outside the provisions of Ss. 30, 38, 40, etc. A *Court* cannot reduce the cash rent of a holding on the ground that the rate paid is above the prevailing rates. A ryot could not sue for abatement of rent simply because the lands which he held were rated higher than those of the same description and similar advantages held by ryots of the same class in the vicinity. *Babun Mundle* v. *Shib Koomaree Burmonee*[26]. The *Revenue Officer* settling rents under Chapter XI is not bound by any such restrictions; his hands are more free to do what he considers to be the justice of the case. He is the best judge of economic facts under the chapter.

While he is invested with the powers exercised by a Civil Court in the trial of suits (R. 1), his discretion in fixing the fair and equitable rent is unfettered. He is not bound to proceed on the sole basis of legal evidence, legally adduced before him, as the ordinary Courts are. If this is so, then it is a very important point. I should not forget that the

26. (1874) 21 W. R. 404.

policy which induced the Legislature to enact these provisions is not open to question or examination by the Courts. Evidently, the Legislature considered it expedient or necessary to enact these—apparently drastic provisions—in the interests of public order or of the local welfare. Again, settlement of rent proceedings concern the whole estate or a portion of an estate; and though there may be hundreds of ryots concerned, the case of each ryot is not kept distinct from the case of the others. No doubt under S. 193 of the Estates Land Act, joinder of ryots in suits relating to enhancement or reduction of rent is permitted. But power is given by S. 198 to order separate trials in cases of such joinder of ryots, if it appears to the Collector before whom the suit for enhancement or reduction of rent has been instituted that the suit cannot be conveniently tried or disposed of as one suit, in which case, the Collector could order separate trial of the suit regarding each ryot. No such provision is made with reference to proceedings under Chapter XI. On the other hand, the very object of the proceedings under Chapter XI would seem to be that the Revenue Officer should consider the cases of all the ryots concerned, and should acquaint himself with the details concerning the whole of the lands, before fixing a " fair and equitable rent". Again, it is a matter for consideration whether individual contracts entered into between particular ryots and the landholder, or even decisions binding on particular ryots only regarding the amount or rates of rent, would bind and conclude the Revenue Officer absolutely in the matter of fixing a fair and equitable rent as regards those particular ryots. In the trial of batches of suits, agreed by parties to be tried together, some of the ryots are likely to be prejudiced by reason of special circumstances affecting some other ryots only. Courts have often expressed regret that in the state of the record, and having regard to the agreement of parties to have a batch of suits tried together, Courts are often not able to do full justice to individual ryots whose cases might otherwise seem to require different considerations. But the officer who has to settle rents under Chapter XI works under no such disadvantages; and—as already remarked—he has got a free hand to mete out such justice to any and all of the ryots concerned as he should think fit. It has been decided in this Court that the Revenue Officer is not bound by the restrictions imposed by Ss. 30, 38 or 40 of the Act in proceedings under Chapter XI.

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In *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[13] this is what Mr. Justice Devadoss says at page 507:

" In making a record-of-rights the Revenue Officer has to be guided by considerations which are not necessarily the same as those arising under S. 30 . . . Whatever may be the rate of rent, if he considers that it is not fair and equitable, he is entitled to alter it, and in doing so he is not bound by the rule in S. 30 under which the increase cannot be more than two annas in the rupee. Under Chapter XI the Revenue Officer may reduce the rent and may settle different rates of rent for land of different value and different fertility, having regard to the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitable rent."

At page 508 this is what Mr. Justice Waller says:

"I agree that the Revenue Officer in settling a fair and equitable rent is not bound by the provisions of S. 30 of the Act."

The provisions of S. 170 deserve special notice. The Revenue Officer is to submit the settlement record prepared by him to the confirming authority appointed by the Local Government. Can this be reconciled with our ideas of a Court of law which has to decide on its own responsibility on the legal evidence before it ? One is reminded of the provisions of S. 31 of the Code of Criminal Procedure that.

" while a Sessions Judge could convict an accused of the offence of murder and sentence him to death, the sentence of death passed by him shall be subject to confirmation by the High Court".

But the provision for submitting the settlement record to the confirming authority is surely a peculiar one, and there is nothing corresponding to the same in the law applicable to a Court, as ordinarily understood. There is, again, power given to the Revenue Officer, of his own motion or on the application of any party aggrieved, at any time before the settlement record is submitted to the confirming authority, to revise any rent entered therein.

Again, under S. 172, the Board of Revenue may direct the revision of the entries in the settlement record within two years from the date of publication of the same under S. 170. In the case of a Civil Court such provisions would seem to be, to say the least, very startling.

Again, under sub-section (3) of S. 168, the Revenue Officer may *propose* to the parties such rent or rate of rent as he considers fair and equitable. Could it be said that a Court of Justice could act in such a way ? It would at once be said that the Court—if it proposed such things to a party to a litigation

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13. (1925) I. L. R. 49 M. 499.

before it—has pre-judged the rights of the parties; it would even afford ground for transferring the case to some other Court. This provision in S. 168 is rather important as indicating the real nature of the functions of the Revenue Officer in such proceedings under Chapter XI.

Section 173 specifies cases in which entries in settlement record are open to question in a Civil Court; and S. 176 enacts that

" otherwise all rents settled under Ss. 168 to 170 or settled under S. 171 shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of the Act".

There was some discussion before us as to whether it is open to the Civil Court to question the *rate* of fair and equitable rent settled under Chapter XI. Having regard to the limited nature of the provisions of sub-sec. (4) of S. 173, it is open to question whether it is competent to the Civil Court to do so. The whole policy of the Act in this respect would seem to be to make the rent fixed under Chapter IX conclusive and binding in Civil Courts. In cases where a right of suit is given, relating to certain matters, *viz.*, when the Revenue Officer had not settled the rent, if the Civil Court should be of opinion that the relationship of the landholder and ryot existed between parties and that the ryot is liable to pay rent, then the Civil Court could only direct that the Collector should fix a fair and equitable rent; it would seem that the Civil Court could not itself fix the rent. This would seem to be the opinion of both Devadoss and Waller, JJ., in the case reported in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*,[13]. See page 507 of Mr. Justice Devadoss' judgment where the learned Judge says that " the parties have no right of suit in such a case"; and at page 508, where the other learned Judge, Waller, J., also says that " there is no right of suit in regard to such a question". These were the arguments available to support the contention that the *rate* of rent fixed is binding on the Civil Court.

I should have been glad to be able to arrive at the conclusion that the rate of rent fixed under Chapter XI could be challenged in the Civil Courts. But it is not however necessary for me to give a decided opinion now on this point. *If* the Civil Courts have no jurisdiction to question the rate of rent

13. (1925) I. L. R. 49 M. 499.

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fixed by the Revenue Officer under Chapter XI, then that circumstance would undoubtedly increase the gravity of the situation; for, there is nothing more vital either to the landholder or to the ryot than the question of the *rate* of rent; and if that question is taken to be finally decided by the Revenue Officer, then a most valuable legal right is prejudicially affected by proceedings under Chapter XI. Very clear indications would then be necessary to enable us to say that proceedings which have such serious effect are not subject to the superintendence of the High Court.

These considerations have given me great anxiety in the decision of this case.

I have tried to examine the provisions of the Act, bearing all these considerations in mind.

I shall proceed to refer to one or two more considerations that arise from the other provisions of the Act.

Regarding the expenses incurred in the preparation of the record-of-rights, S. 180 enacts that

"the Local Government may direct that the landholders and ryots shall defray the same in such proportion as the Government may fix, and that such expenses incurred by Government may be recovered as arrear of land revenue under the provisions of the Revenue Recovery Act."

One can understand the costs of the proceedings in *Court* being determined by the *Court* inquiring into the case. This provision that the Government, and not the Revenue Officer who conducted the proceedings, (the Government of course not having heard any part of the case) should fix the expenses incurred in connexion therewith and apportion the same between the landholder and ryots, is rather inconsistent with the notion that the tribunal set up under Chapter XI of the Act is a *Court* as *ordinarily* understood.

It is no doubt true that under S. 139, cost of repairs of irrigation works, payable by the ryot or the landholder as the case may be, may be recovered as an arrear of land revenue; but, there, the Collector enquires into the matter and passes orders regarding the amount payable by each ryot in proportion to the rent of the land held by him.

Proceedings under Chapter XI relating to settlement of rent are very important as they undoubtedly affect valuable legal rights of the landholder and the ryots. It is only when the landholder or a specified portion of the ryots make an application to the Local Government that the Local Government could

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direct the settlement of rents under Chapter XI. So far, we have got a case of dispute between private persons as regards their legal rights. I have already noticed the provisions of Chapter XI which preclude certain questions from being contested in Civil Courts. If the amount or rate of "fair and equitable rent" be one of such questions, then it is a matter of very great importance to both the landholder and the ryot that they should not be prejudiced in respect of such important rights. But, if anything is clear from Chapter XI (which by the way—in my opinion—is very obscure and difficult to construe, as regards several of its provisions), it would seem to be this: that the Legislature—probably in the interests of public order or of the local welfare and as a matter of policy—wanted to make a departure from the ordinary mode of settling disputes between the landholders and the ryots regarding rent and other incidents connected with the holdings. It wanted to provide specially for cases where particular estates or portions of the estate were concerned, which, in their view, demanded a different treatment. If it was the intention that the Revenue Officer mentioned in Chapter XI should have the exact status occupied by the Revenue Officer to whom determination of questions relating to rent, etc., were entrusted under Ss. 30, 38, 40, etc., of the Act, then nothing would have been easier than to include in the Schedule annexed to the Act, specific sections of Chapter XI, and provide for appeals to particular Courts. That would have made matters absolutely clear. In fact, the Revenue Officer proceeding under Chapter XI of the Act is nowhere referred to in that Act as a Court, just as the Collectors and other Revenue Officers who hear suits and applications specified in the Schedule are described in S. 189 and the Schedule attached to the Act, and elsewhere, as Courts.

On the other hand, the Legislature has not only—purposely—omitted to do so, but has dealt with the question of settlement of rents in a separate chapter—apparently self-contained—as regards forum of appeal, limitation, and procedure. The Local Government have also been given special power to frame rules to guide the Revenue Officers in the discharge of their duties under Chapter XI.

It is true that the legal rights of the landholder and the ryots are affected materially by the proceedings taken to settle rent under Chapter XI. Again, certain provisions of the Code

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of Civil Procedure are made applicable to settlement of rent under Chapter XI, in so far as they are not inconsistent with the provisions of that chapter. Further, under the rules, the Revenue Officer is invested with all the powers exercised by a Civil Court in the trial of suits, among various other powers conferred upon him by the rules.

On the other hand, there are the various other circumstances pointed out above which are not quite consistent with one's ordinary notions of a Court of law adjudicating judicially on the legal rights of litigants.

What then is the inference to be drawn from all the circumstances in deciding whether the officer mentioned in Chapter XI is constituted a Court? No doubt it is not by the mere appellation given to an officer that one has to decide whether he is a Court or not, but rather by the functions that he is directed to discharge and the mode by which he is to discharge the same, the effect of his proceedings on legal rights of parties, and by the other circumstances connected with the exercise of his jurisdiction.

I must admit that this portion of the case has given me great anxiety, and I felt it very difficult to make up my mind in the matter; but after giving the best consideration I can to the case, I have come to the conclusion that neither the Revenue Officer nor the confirming authority, nor the Board of Revenue, when exercising jurisdiction under Chapter XI of the Estates Land Act in relation to settlement of rents, is a "Court subject to the appellate jurisdiction of the High Court".

There has been no general definition of "Court of law"—so far as I am aware. The word "Court" has been defined for the purpose of specific enactments. See the Indian Evidence Act, S. 3 and the Indian Penal Code, S. 20—(Court of Justice). I am glad, however, in having been able to get some help from some of the decided cases. In *Manavala Goundan* v. *Kumarappa Reddy*[27] the question arose whether a District Registrar exercising powers in an appeal presented under S. 73 of the Registration Act is not a "Court" within the meaning of S. 622 of the Code of Civil Procedure, 1882 (corresponding to S. 115 of the present Code). Mr. Justice Subrahmania Aiyar observed at page 327 ofthe report as follows:—

27. (1907) I. L. R. 30 M. 326: 17 M. L. J. 313.

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"The word 'Court' in S. 622 of the Code of Civil Procedure should be understood in its ordinary legal sense, 'a place where justice is judicially administered'—see Stroud."

Again, at the bottom of the page, the learned Judge observed:

"Assuming that the functions which the Registrar exercises in a case such as was before him in the present instance were altogether judicial, that would not warrant the conclusion that his decision was that of a Court."

The learned Judge dismissed the revision petition and upheld the preliminary objection, and held that the High Court could not in such a case interfere under S. 622 of the Code of 1882.

In *Krishnamal* v. *Krishnaiyangar*[28] a decision of a Full Bench composed of Sir Charles Arnold White, C. J., and Sankaran Nair and Ayling, JJ., the decision in *Manavala Goundan* v. *Kumarappa Reddy*[27] was referred to with approval.

A decision of the Privy Council reported in *Shell Company of Australia, Limited* v. *Federal Commissioner of Taxation*[29] was relied upon, each side relying on the said decision in support of its own contention. In the case reported in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation*[30] the High Court of Australia decided that "the Board of Appeal created by S. 41 of the Income-tax Assessment Act, 1922, exercised part of the judicial power of the Commonwealth and was therefore a tribunal contrary to Ss. 71 and 72 of the Constitution of Australia, in that its members were to be appointed not for life but for a period of seven years": and the High Court quashed the assessment made by the Board of Appeal in that case. By a reference to page 286 of the report, it would be seen what the functions of the Board of Appeal in that case were. One of the provisions of the Act was that an appeal shall lie to the High Court in its appellate jurisdiction from any order passed under sub-sec. (1) of S. 51, except a decision by the Board on a question of fact. The provision that an appeal would lie to the High Court in its appellate jurisdiction from the decision of the Board of Appeal on a question of law, would, ordinarily, make the Board of Appeal, having regard to its functions, *prima facie* a judicial tribunal subordinate to the High Court. The Board of Appeal was subsequently replaced by a Board of Review whose powers were different from the

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27. (1907) I. L. R. 30 M. 326: 17 M. L. J. 313.
28. (1912) 23 M. L. J. 50 (F. B.). 29. (1931) A. C. 275.
30. (1925) 35 C. L. R. 422.

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powers of the Board of Appeal. The members of the Board of Review were also appointed for a period of seven years. A similar objection having been taken to the constitution of the Board of Review, the Privy Council held that the Board of Review was not a judicial tribunal, but was only an administrative body, having regard to its functions. It must be noticed that a right of appeal to the High Court was given under the Act, both to the Commissioner as well as to the taxpayer, from any decision of the Board which in the opinion of the High Court involves a question of law; and in spite of such a provision, the Board of Review was held to be not a Court or a judicial tribunal; it was held that even a right of appeal, by itself, would not establish the vesting of the judicial power either in the Commissioner or in the Board of Review since the Parliament may have imposed upon the Court the duties of reviewing administrative determination (page 295). Of course, no tribunal could be held to be a judicial tribunal unless it had power to give a binding and authoritative decision, whether subject to appeal or not, in a dispute arising between the State and its subjects, or, between the subjects *inter se*, whether the dispute relates to life, liberty or property. Our attention was also drawn to the following observations at pages 296 and 297 of the report:

"The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court.

"In that connection it may be useful to enumerate some negative propositions on this subject: (1) A tribunal is not necessarily a Court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a Court. (6) Nor because it is a body to which a matter is referred by another body. See *Rex* v. *Electricity Commissioners*[31]."

As it was admitted in that case that the Commissioner was not acting in a judicial capacity, but only in an administrative capacity, the present question had not to be decided in that case. The contention that the Board of Review should be held to be a Court exercising judicial power—(1) because its jurisdiction arose only if set in motion by the taxpayer, and (2) because the matter for its decision was a *lis* between the taxpayer and the Commissioner affecting legal rights, and (3) because his

31. (1924) 1 K. B. 171.

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decision was conclusive, subject to an appeal to the High Court,—was not accepted by the Privy Council.

Having carefully considered the decision in *Shell Company of Australia, Limited* v. *Federal Commissioner of Taxation*[29] I am not able to see that the functions exercised by the Board of Revenue in proceedings to settle rents under Chapter XI of the Estates Land Act show that it is a Court in the ordinary acceptation of that term.

Decisions relating to writ of *certiorari* are not of any direct use here. I am not here concerned with the question whether a writ of *certiorari* would lie only against proceedings of a Court of Justice. It would seem that the category of bodies against which a writ of *certiorari* can be issued is wider than that of Courts of Justice. (See *Rex* v. *Electricity Commissioners*,[32] per Atkin, L. J.) The learned Lord Justice there observed as follows:—

> "It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In the above view, it is not necessary to consider the other arguments advanced by the learned advocate for the petitioner, viz., that an appeal need not lie to the High Court in every matter but that it would be enough if appeals lie from the decisions of the Court to the High Court in respect of its decisions ordinarily, whatever might be the restricted scope of such appeals. Reference was made to the Bengal Tenancy Act; but its provisions in this respect would seem to be different substantially from the provisions of Chapter XI of the Madras Estates Land Act in this respect. *See* S. 104 (*j*).

Under S. 104 (*h*) of the Bengal Tenancy Act, a right of suit in the Civil Court is available to any persons aggrieved on any of the grounds mentioned in clause (3) of that section; and under sub-clause (4), the Civil Court is given the right to "settle a fair rent". *See also* S. 104 (*h*), sub-clauses (6) and (7). No doubt, as mentioned already, it is not quite clear

29. (1931) A. C. 275.

32. (1924) 1 K. B. 171 at 205.

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whether it is or it is not open to the Civil Courts to consider the correctness or otherwise of rate or amount of fair and equitable rent settled under Chapter XI of the Madras Estates Land Act. This point has already been discussed by me.

A decision of the Calcutta High Court in the case reported in *Uma Charan Mondal* v. *Midnapur Zemindari Co.*[33] was brought to our notice, as being a very similar case. While holding that for the purposes of attracting the power of superintendence vested in the High Court under S. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to the High Court in the very proceeding in which the power of superintendence is involved, the learned Judges—Sir Asutosh Mookerjee and Beachcroft, JJ.—held that as the superintendence vested in the High Court by S. 15 of the Indian High Courts Act can be exercised only over "Courts which are subject to the appellate jurisdiction of the High Court", the High Court had no jurisdiction to exercise its powers of superintendence over the Revenue Officer before whom a proceeding for settlement of fair rent was instituted under S. 85 of the Chota Nagpur Tenancy Act, as that officer was not "a Court subject to the appellate jurisdiction of the High Court", but was subordinate to the Commissioner.

Even if the Revenue Officer be "a Court", the learned Judges held that he was not a "Court subject to the appellate jurisdiction of the High Court". The decision in *Kartik Chandra Ojha* v. *Gora Chand Mahto*[34] was distinguished on the ground that proceedings on applications for enhancement of rent under the provisions of Ss. 27 to 30 of the Chota Nagpur Tenancy Act are judicial proceedings before the Deputy Commissioner, who was, for this purpose, "a Court subordinate to the appellate jurisdiction of the High Court". The learned Judges observed:

"It would in our opinion be anomalous to hold that where, by statute, superintendence over a Revenue Officer is vested in a particular matter in the Commissioner and the Board of Revenue, the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the appellate jurisdiction of this High Court. In our opinion, S. 15 of the Indian High Courts Act, 1861, has no application to proceedings for settlement of fair rents instituted before a Revenue Officer under S. 85 of the Chota Nagpur Tenancy Act, 1908. In this view the rule must be discharged."

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33. (1914) 19 C. L. J. 300 : 18 C. W. N. 782.
34. (1913) I. L. R. 40 C. 518.

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Prima facie, that decision would seem to support the view urged on behalf of the respondents in the present case; it points out the difference between the nature of proceedings on applications for enhancement, reduction or commutation of rent, and proceedings settling fair and equitable rent. But, before one relies on a decision passed on a special Act of another Legislature relating to a different Province, it would be necessary to consider all the material provisions of that Act before one could confidently apply that decision to a case arising under a different—though an analogous—Act, passed by a different Legislature relating to another Province.

For the above reasons, holding that the Board of Revenue should not be taken to be a "Court of law" when exercising powers under Chapter XI of the Madras Estates Land Act, at any rate not "a Court subordinate to or subject to the appellate jurisdiction of the High Court," I am inclined to hold (though not without hesitation), that the present Civil Revision Petition is not maintainable; and I would accordingly dismiss the Civil Revision Petition with costs.

Beasley, C. J.

The Chief Justice.—I agree with the answers of my learned brothers, Reilly and Anantakrishna Aiyar, JJ., to the first question referred to us; and as it has been dealt with at length by them, I propose to address myself only very briefly to this matter.

I wish, first of all, to observe that the procedure adopted by the referring Judges is, in my opinion, incorrect. They have taken the view that the answer in the negative given by Phillips and Odgers, JJ., in *Raghunadha Patro* v. *Govinda Patro*[20] to the question, "Has the High Court in the exercise of its revisional jurisdiction either under S. 115 of the Civil Procedure Code or S. 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or S. 205 of the Estates Land Act ?" is *obiter dictum* and they have also doubted the correctness of that answer. The question is precisely the same as the first question that has been referred to us and it has been answered in the negative by the majority of that Full Bench. It being a question referred to that Full Bench, it seems to me that it was not open to the referring Judges to regard the answer to it either as *obiter dictum* or to refer the matter to a larger Bench because they

20. (1928) 55 M. L. J. 798 (F. B).

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doubted its correctness. The proper procedure in such cases, in my opinion, is to refer the matter to the Chief Justice and it is then for him to consider whether the question should be reconsidered by a larger Bench.

In considering the first question, it is not necessary to say whether S. 115 of the Code of Civil Procedure or S. 107 of the Government of India Act gives power of revision over orders passed by the Board of Revenue under the Act generally as the only question here relates to orders passed in proceedings under Chapter XI of the Act. That question is whether the proceedings of a Revenue Officer under that chapter are proceedings by him as a Civil Court or not. If they are not, then orders passed by the Board of Revenue under that chapter, it is conceded, cannot be. In making the survey and the record-of-rights under Ss. 164 to 167, the Revenue Officer is acting only as an executive officer. It remains to be considered whether what is done subsequently is done by the Revenue Officer as a Civil Court. As has been pointed out in their answers by Reilly and Anantakrishna Aiyar, JJ., the procedure adopted is certainly not that found in other Civil Courts; and amongst these, there is, in my view, the very important one that, in settling the rent under Chapter XI, the personal and local experience of the Revenue Officer plays a large part. It seems to me that he has an unlimited discretion and that he can, if he so chooses, or in the absence of any other evidence, act solely upon his own experience. If he can be said to be acting as a Civil Court, then he must be deemed to be both a witness and judge. I agree that the scheme of the Act seems to be to keep the proceedings under Chapter XI entirely separate and apart from the other proceedings in the Act. It is true that in other sections of the Act relating to rent a right of suit is given; and those proceedings are clearly proceedings of a Civil Court. Such are suits under S. 30 for enhancement of rent, S. 38 for reduction of rent and S. 40 for commutation of rent. But in all those cases it is expressly provided that there is an appeal from the Collector to the District Court, in the case of S. 40 so far as the decree determines the sum to be paid as money rent or the time from which commutation shall take effect. There being an appeal to the District Court, there is a second appeal to the High Court. The fact that such a right of appeal is omitted in Chapter XI, in my opinion, supports the view that it was

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intended by the Legislature to draw a distinction between those proceedings and the other proceedings under the Act. It is to be observed also that, in the proceedings under Ss. 30, 38 and 40 of the Act, the Collector must have regard to the very definite materials set out in those sections, all of which seem to me to be matters of evidence, whereas in Chapter XI the Revenue Officer can act entirely or partly on his own experience. I agree to the answer proposed by my learned brothers Reilly and Anantakrishna Aiyar, JJ. Civil Revision Petition No. 192 of 1926 will be dismissed with costs.

Ramesam, J.

Ramesam, J.—The facts out of which this revision petition arises are stated in the referring judgments and also in the judgments of my learned brothers, Reilly and Anantakrishna Aiyar, JJ., which I have had the advantage of perusing. It is, therefore, unnecessary to set forth the facts again.

The first question referred to us is, whether an order of the Board of Revenue under S. 172 of the Estates Land Act is subject to revision by the High Court or not. The reference has become necessary by a decision of a Full Bench of this Court in *Raghunadha Patro* v. *Govinda Patro*[20]. One of the three learned Judges who decided that case, Venkatasubba Rao, J., observed that, so far as Chapter XI of the Act was concerned, the point did not actually arise before them and abstained from expressing his opinion on that matter. But the other two learned Judges, Phillips and Odgers, JJ., considered the question whether the High Court had power to revise orders of the Board of Revenue both under S. 205 and under Chapter XI of the Estates Land Act and it was because of their opinion that with reference to both kinds of orders no revision lay that the learned Judges who made the present reference thought it necessary to refer the question to a larger Bench.

Mr. Varadachari, the learned advocate for the petitioner, in questioning the correctness of the decision in *Raghunadha Patro* v. *Govinda Patro*[20] sought to establish two propositions before us, first, that the Board of Revenue when acting under S. 205 or under Chapter XI of the Act acts as a Court and, secondly, if it is a Court, though it may be a Revenue Court, it is still a Civil Court for the purposes of S. 115 of the Code of Civil Procedure and the High Court has, therefore, power to

20. (1928) 55 M. L. J. 798 (F. B.).

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revise its orders. I do not propose to deal with his arguments with reference to S. 205 elaborately. Some of them are noticed by my brother Anantakrishna Aiyar, J., and some by the referring Judges. In my opinion, the arguments of Mr. Varadachari have made out a *prima facie* case for considering that the orders of the Board of Revenue under S. 205 are liable to revision by the High Court and this is also the opinion of my learned brother, Anantakrishna Aiyar, J., and the two referring Judges, Wallace and Tiruvenkata Achariyar, JJ. Though we have heard the arguments of the learned advocate for the respondents only on the second point, namely, whether the Board of Revenue, when acting under Chapter XI of the Act, can be considered as a Court at all, I am unable to agree with the opinion of the majority of the Judges in *Raghunadha Patro* v. *Govinda Patro*[20] so far as it relates to S. 205 of the Estates Land Act and I think that portion of the case requires further consideration when a suitable opportunity arises.

The actual point that arises before us is, whether the Board of Revenue, acting under S. 172 of Chapter XI, can be regarded as a Court. On this point I agree in the main with the judgments of Reilly and Anantakrishna Aiyar, JJ. My brother Reilly, J., observes in his judgment: "There is no doubt that the theory of revenue administration held by the Government was that what the Zamindar in a permanently settled estate had a right to collect from the ryot was the *rajabhagam* or Government share of the produce of his land. By the permanent settlement of 1802 the Government had left to the Zamindar on condition that he paid his fixed peshcash the right to collect the *rajabhagam* from the ryot. The right of the Government, which is recognized in the Act to interfere and 'settle' the amount of the *rajabhagam* when the lawful rate of rent fixed by contract, decree or otherwise is not fair or equitable depends ultimately on the theory that it is proper for the Government to see that the Zamindar gets from the ryot the fair and equitable *rajabhagam*, no more and no less." Later on he also observes that the Government reflected the ideas of the revenue history and policy which had been traditional in this Presidency. I agree with the learned Judge that at the time when the Estates Land Act was passed these were the ideas which influenced the Government in undertaking that legislation. So far as the

20. (1928) 55 M. L. J. 798 (F. B.).

Courts are concerned, there was no such tradition until some time after 1890. It was expressly negatived by the decision of Scotland, C. J., and another learned Judge in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*.[35] The tradition began to show itself in *Appa Rao* v. *Ratnam*,[36] *Vencata Mahalakshmamma* v. *Ramajogi*[37] and *Venkata Narasimha Naidu* v. *Ramasami*[38]. It definitely shaped itself only in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*[39] and *Cheekati Zamindar* v. *Ranasooru Dhora*[40] and undoubtedly it is on the theory so definitely shaped by the last two decisions that the legislation of the Estates Land Act was based. But as that theory relates only to permanently settled estates, it does not apply to inams and is, therefore, strictly not applicable to estates of the kind defined in S. 3, clause (2) (*d*) of the Estates Land Act. But I see that Chapter XI is not confined to permanently settled estates only. It is therefore unsafe to rely upon any theory underlying the legislation contained in Chapter XI; and the safest method would be to examine the provisions of the chapter itself. On this matter I agree with the reasons of Reilly and Anantakrishna Aiyar, JJ., and have nothing to add. It is possible that as a result of this construction the landholders have a grievance as to the scope and application of S. 173 of the Act in relation to S. 165 (*e*) but the remedy is to get the section amended.

I agree with the order proposed by my Lord the Chief Justice. The memorandum of cross-objections is also dismissed.

Sundaram Chetty, J.

Sundaram Chetty, J.—I regret, I have to come to a different conclusion.

This is a petition filed by the Rajah of Mandasa invoking the revisional jurisdiction of the High Court for the purpose of revising an order of the Board of Revenue passed under S. 172 of the Madras Estates Land Act in exercise of its powers of revision under that section. In connection with the preparation of the record-of-rights under Chapter XI of the Act, a Special Revenue Officer was deputed to settle fair and equitable rents under S. 168 of the Act in respect of the holdings of ryots in a number of villages appertaining to the

35. (1871) 6 M. H. C. R. 164. 36. (1889) I. L. R. 13 M. 249.
37. (1892) I. L. R. 16 M. 271. 38. (1894) I. L. R. 18 M. 216.
39. (1897) I.L.R. 20 M. 299: 7 M.L.J. 251. 40. (1899) I.L.R. 23 M. 318.

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Mandasa Estate. Objections were filed under S. 169 against the settlement and were disposed of by that officer. It is said that appeals were filed by the ryots under S. 171 to the Board of Revenue, but those appeals were dismissed by the Board as out of time. Subsequently, when a petition presented by the ryots to His Excellency the Governor was forwarded to the Board of Revenue, the latter took up the matter on revision *suo motu*, under S. 172, and passed orders revising the rates of rent in favour of the ryots. By reason of this order passed in revision, it is said that the Rajah would suffer an annual loss of Rs. 22,000.

The first and the most important question arising for determination is whether the High Court has jurisdiction to revise the order of the Board of Revenue above referred to. This question has been considered at some length by the learned referring Judges and the trend of their opinion clearly seems to be that the High Court has jurisdiction to exercise its powers of revision under clause 16 of the Letters Patent as also S. 107 of the Government of India Act. In the first place, what we have to determine is whether the Revenue Officer who settles the rates of rent payable by the ryots to the landholder under Ss. 168 and 169 of the Act should be deemed to be a Court exercising judicial powers or only an executive officer exercising administrative powers. The Board of Revenue being constituted the appellate authority to deal with an appeal presented against the decision of the Revenue Officer under S. 171, and being also the revisional authority under S. 172, it must also be deemed to function as an appellate or revisional authority in a matter of this kind in the same character in which the Revenue Officer is deemed to function. If the Revenue Officer is held to be a Court exercising judicial powers, the Revenue Board also must be taken to be a Court when it deals with an appeal or an application for revision in connection with an order passed by the Revenue Officer. The determination of this question is beset with some difficulties and the opinion of some of the learned Judges of this High Court is also conflicting.

A brief outline of the scheme of the Act with respect to the settlement of rents under Chapter XI is necessary in order to understand the real nature of the functions exercised by the Revenue Officer in this respect. Ss. 164 to 167 deal with the procedure to be adopted in the preparation of a record-of-rights.

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The entries made in such a record-of-rights would be evidence of the matter referred to therein and should be presumed to be correct until the contrary is proved. The Act provides for a settlement of the rents also, if within two months from the date of the final publication of the record-of-rights, the landholder or the ryots apply for a settlement of the rents. In case the application is made by the ryots, they should be holders of not less than one-fourth of the total extent of the lands in the village. If the Local Government so direct, the Revenue Officer shall settle a fair and equitable rent in respect of those holdings. In settling rents under S. 168, the Revenue Officer shall presume, until the contrary is proved, that the existing rates of rent are fair and equitable and shall have also regard to the provisions of the Act for determining the rates of rent payable by the ryot. When settlement has been completed under S. 168, the Revenue Officer should cause a record thereof to be prepared and published in the prescribed manner. He should receive and consider any objections made to any entry in such record or omission therefrom and dispose of those objections according to such rules as the Local Government may prescribe. Until reasonable notice is given to the parties concerned to appear and be heard in the matter, no such entry shall be revised by him. When all objections have been disposed of, the Revenue Officer has to submit the settlement record to the confirming authority appointed by the Local Government. The confirming authority may sanction the settlement of rents with or without amendment, but no amendments or alterations can be made by it without giving reasonable notice to the parties concerned and hearing their representations. After sanction by the confirming authority, the settlement record should be incorporated in the record-of-rights which will have a final publication in the prescribed manner. An appeal shall lie from every order passed by a Revenue Officer on any objection made under S. 169. The appellate authority would be the one constituted by the Local Government. Under S. 172 the Board of Revenue may on application or of its own motion direct the revision of any record-of-rights within a period of two years as specified in the section. In passing orders by way of revision, the Board should not affect any order passed by a Civil Court under S. 173. No orders can be passed by the Board under this

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section until reasonable opportunity is given to the parties concerned to appear and be heard in the matter. A right of suit in a Civil Court to any person aggrieved is provided for in S. 173, but subject to the restrictions imposed by sub-sec. (3). A note of all decisions on appeal under S. 171 and of all orders of a Civil Court notified to the Collector should be made in the record-of-rights with which the settlement record is incorporated under S. 170. The rents finally settled in the aforesaid manner are not liable to be enhanced for a period of twenty years except on some of the grounds specified in Ss. 30 and 38. During the pendency of an application for the settlement of rents under S. 168, no suit or proceeding shall be commenced or continued in any Civil or Revenue Court under Ss. 30, 38 and 40 until after the final publication of the record-of-rights under sub-sec. (3) of S. 170. Under the Rules framed by the Local Government by virtue of the powers vested in them under S. 215 of the Act, the Revenue Officer, who has got to make a settlement of rents under Chapter XI, has all the powers exercised by the Civil Court in the trial of suits. In respect of the application for settlement of fair rents the applicant or applicants shall be considered as plaintiffs and the opposite party as defendants for the purpose of procedure in the enquiries to be made by the Revenue Officer. The Revenue Officer shall be governed, so far as may be practicable, by the provisions of the Code of Civil Procedure.

Having regard to the functions of the Revenue Officer, who has to decide on the application of either the landholder or the ryots what the fair and equitable rents payable for the holdings are, is he to be deemed a Court acting judicially or only an executive officer acting in an administrative capacity? If regard be had to some other provisions of the Act under which the Revenue Officers exercise almost similar functions and decide disputes of almost the same nature, it is clear that those officers are deemed to be Revenue Courts. S. 189 of the Act makes the Collector or other Revenue Officer specially authorized under the Act to hear and determine suits and applications of the nature specified in Parts A and B of the Schedule distinctively a Revenue Court. Though the application for settlement of fair and equitable rents made under S. 168 is not one of the applications specified in Part B of the Schedule, there seems to my mind no doubt the nature of the subject-matter of

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the dispute involved in such an application is almost the same as the nature of the suits under Ss. 30, 38 and 40 of the Act. S. 30 relates to a suit by the landholder before the Collector for enhancement of rent on one or other of the grounds specified therein. The rise in the average local prices may also be a ground for claiming enhancement. The fact that the productive powers of the land held by the ryot have been increased by fluvial action may also be taken as a ground for that relief. An occupancy ryot may also institute a suit before the Collector for the reduction of his rent on one or other of the grounds set forth in S. 38. The permanent deterioration of the soil of the holding by a deposit of sand or by other specific cause would be a ground for claiming reduction of rent. The fall in prices may also be urged as a ground. Similarly, either the ryot or the landholder may sue before the Collector for the commutation of rent under S. 40. It is open to the Collector to decide whether commutation should be allowed or not and, if he allows commutation, he can pass a decree declaring the same to be paid as money rent in lieu of rent in kind. In making the determination, the Collector should have regard to the considerations set forth in clauses (*a*), (*b*) and (*c*) to sub-sec. (3). S. 193 of the Act provides for a suit for enhancement or reduction of rent by or against any number of ryots collectively. The decisions in suits for enhancement and reduction of rent and also for commutation of rent will ordinarily have a binding force for twenty years as provided by Ss. 37, 39 and 41. There is no doubt that the Revenue Officer who decides the aforesaid suit is a Revenue Court within the meaning of S. 189 of the Act. The decisions of such Revenue Officer, as also of an appellate or revisional authority, will have the binding force as *res judicata* in any suit or proceeding in a Civil Court in which the same matter may be in issue between the parties. In certain cases a ryot may apply to the Collector under S. 25 to fix a fair and equitable rent for his holding. An appeal against that decision lies to the District Collector; whereas appeals against the decisions of the Revenue Officer in suits under Ss. 30 and 38 lie to the District Court. In a proceeding for commutation of rent under S. 40, the appeal lies to the District Collector in case the decree allows or refuses commutation. In so far as the decree determines the same to be paid as money rent, the appeal must be to the District Court.

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Chapter VII of the Act seems to bear close analogy to that portion of Chapter XI which deals with the settlement of fair and equitable rents. S. 135 deals with an application by any ryot or ryots holding irrigated land under a landholder and paying not less than one-fourth of the rent of the ayacut or holding not less than one-fourth of the extent of the ayacut for the purpose of getting an irrigation work repaired. On receipt of such an application, the District Collector by himself or by an officer subordinate to him to whom he may depute the enquiry, cause to be served on the landholder a copy of the application and a notice to show cause why the order prayed for should not issue. If an enquiry is made by an officer other than the District Collector, such officer should make a report thereon to the District Collector. Under S. 137, the District Collector may pass the necessary orders as a result of the enquiry. The landholder may apply to the District Collector to set aside his order by way of review and, if he is dissatisfied with the order made, he may appeal to the District Court. As against the Collector's order determining the rates under S. 141, an appeal lies to the District Collector. S. 142 provides for an appeal to the Board of Revenue unless otherwise provided for in Part B of the Schedule. There is no doubt that the Revenue Officer exercising the functions in connection with applications made under Chapter VII is a Revenue Court.

Now in the matter of settling fair and equitable rents under Chapter XI, the nature of the subject-matter in dispute as also of the functions of the Revenue Officer, who has to enquire and decide the rates of rent properly payable by the ryots to the landholder, seems to be almost similar to the nature of the questions involved in proceedings under Ss. 25, 30, 38 and 40 of the Act and of the functions exercised by the Revenue Officer in connection with such proceedings. That being so, it is extremely difficult to view the Revenue Officer having the authority to settle fair and equitable rents on an application presented under S. 168 not as a Revenue Court but only as an administrative officer. The circumstance that there is some similarity between the procedure prescribed in Chapter XI of the Act for the settlement of fair and equitable rents and the procedure adopted by the Government in effecting periodical revision of assessment payable by the ryots in ryotwari holdings may cause a doubt as to whether the Revenue Officer in

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question could not also be deemed to function as an administrative officer only. In the matter of the periodical revision of assessments by the Government in the course of re-settlement, the Government by way of exercising their sovereign rights depute some special officers as their agents for the purpose of revising the rates of assessment payable by the ryots and settling the same. The Government can do so *suo motu* and no application by any of the ryots is necessary. The collection of revenue due to the Government being one of the functions to be exercised as part of the sovereign rights, a machinery is constituted by Government for that purpose purely as an administrative body. But in the matter of settlement of rents contemplated in Chapter XI of the Act, unless an application is made for such settlement either by the landholder or by a certain number of ryots, no such enquiry could be directed by the Government by appointing a Revenue Officer for the purpose. In such a case, the Revenue Officer is constituted by the Government, if they like, as a tribunal for the purpose of determining a fair and equitable rent. It is in view of a dispute between private parties in respect of their civil rights that the application itself is made to the Government under S. 168. The tribunal so constituted deals necessarily with the civil rights of parties and finally determines the rates of rent payable by the ryots to the landholder. Though certain forms of procedure prescribed for such determination may not be quite the same as those ordinarily adopted in Courts, the nature of the subject-matter dealt with by the Revenue Officer functioning as a tribunal for the purpose of settlement of rent and the finality attached to his determination as to the rights of parties *inter se* are the fundamental tests to determine the character of that tribunal. In a recent decision of the Privy Council in the case of *Shell Company of Australia, Ltd.* v. *Federal Commissioner of Taxation*[29] their Lordships have elaborately dealt with the question whether a tribunal constituted as the Board of Review for dealing with income-tax assessment should be deemed to be a judicial or administrative tribunal. For that purpose, there was an elaborate review of the several sections in the Income-tax Assessment Act and the Commonwealth of Australia Constitution Act, 1900. As to what is "judicial power" which would make the

29. (1931) A.C. 275.

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officer exercising it a Court, their Lordships have adopted a definition given by Griffith, C. J., as one of the best definitions. That learned Judge has stated thus:

> "I am of opinion that the words 'judicial power' as used in S. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." (*Vide* page 295.)

In the present case, is not the Revenue Officer empowered by the Government to decide an application under S. 168 for the settlement of rent exercising judicial power within the meaning of the above definition? A dispute or controversy between the landholder and the ryots as to the rates of rent properly leviable has to be decided by the Revenue Officer functioning as a tribunal. Such dispute does relate to property. The tribunal has got the power to give a binding and authoritative decision. I include in the word "tribunal" the appellate and revisional authorities also. The special grounds which existed in the case dealt with by their Lordships for holding that the Board of Review was not a judicial but only an administrative tribunal do not exist in the present case. On page 294, their Lordships observe that by an alteration in the law the nature of the old tribunal was transformed. The section which previously applied sections creating judicial powers to the Board was absolutely transformed in the new Act. Instead of assimilating the Board to the Court as in the old section the Board in the new section was assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it was given the powers and functions of the Commissioner who exercised no judicial power as was conceded in that case (*vide* pages 294 and 297). Their Lordships have also laid down some negative propositions on this subject as affording no conclusive tests. As I have already pointed out, the subject-matter in dispute to be decided by the Revenue Officer in connection with an application for settlement of rent under S. 168 is almost the same as the subject-matter of the proceedings under Ss. 25, 30, 38 and 40 and if the Revenue Officer deciding the proceedings of the latter kind should be deemed to hear and determine those suits and applications as a Revenue Court, why

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should the Revenue Officer giving his decision as a result of the enquiries made by him on an application under S. 168 be deemed to be not a Revenue Court but only an administrative functionary ? In this connection, the decision of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] may be referred to, as it contains a very clear pronouncement as to what would make a tribunal a Civil Court. Their Lordships had to deal with the question whether a Rent Court established by a special Act should be deemed to be also a Civil Court for certain purposes. The observation of their Lordships is as follows:—

> "It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act. . . . But it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights."

According to this definition, even if a Court is designated as a Revenue Court, it must be deemed to be a Civil Court, if it decides on purely civil questions between the persons seeking their civil rights. Applying this test, the Revenue Officer constituted as a tribunal by the Local Government under S. 168 of the Act for the purpose of deciding the dispute between the landholder and ryots and settling fair and equitable rents payable by one party to the other, must be taken to be virtually deciding questions relating to property which are civil questions as between persons seeking their civil rights (who are arrayed as plaintiffs and defendants). In the light of the definitions given in both the decisions of the Privy Council above referred to, I have to come to the conclusion that the Revenue Officer who settles the rates of rent as fair and equitable as also the appellate and revisional authorities in connection with that matter could not be properly deemed to be functioning in an executive or administrative capacity. On the other hand, they are virtually Revenue Courts within the spirit of S. 189 of the Act. The fact that the Revenue Officer in connection with that application has to deal with groups of individuals and also groups of holdings comprised in a village does not furnish an indication of his functions being only administrative and not judicial. Even a suit for enhancement or reduction of rent may be instituted against or by any number of ryots collectively

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 at 300 (P. C.).

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(*vide* S. 193) and an application under S. 135 may also be made by a group of individuals. This feature does not militate against the character of the tribunal being a judicial one. According to sub-sec. (4) of S. 168, even where the parties agree among themselves by way of compromise or otherwise as to the amount of rent payable, the Revenue Officer is not bound to decide in terms of the compromise unless he is also satisfied that the amount agreed upon is fair and equitable. Does this restriction necessarily indicate that the officer is not meant to deal with the application judicially but only in his administrative capacity? If we turn to S. 199 of the Act, it is clear that the provisions of the Code of Civil Procedure relating to compromise of suits do not apply to any suit or application between the landholder and ryot. By reason of this restriction, the Revenue Court dealing with a suit or application between the landholder and the ryot cannot be deemed to be not a Court but an administrative authority. Even in civil suits properly so called, a compromise between parties, of whom some are minors, cannot be acted upon unless the Court thinks fit to sanction the compromise on behalf of the minors.

It is true that the Revenue Officer, constituted as a tribunal for the settlement of fair and equitable rents, is given, in the matter of arriving at his decisions, wider powers, larger discretion, and greater scope for making alterations in the existing rates of rent, by way of enhancement or reduction, than the Revenue Officers who have to decide suits or applications under Ss. 25, 30, 38 and 40 of the Act. The Revenue Officer settling fair and equitable rents should by virtue of S. 168 (2) have regard to the provisions of the Act, for determining the rates of rent payable by the ryot. This means that he should apply the principles laid down in other sections, for enhancing or reducing the existing rents in force as lawful rents, but he is not restricted to those considerations alone in deciding what is the fair and equitable rent. If by means of special legislation in Chapter XI of the Act, a Revenue Officer is invested with larger powers than the Revenue Officers exercising functions under some other sections of the Act, and has more freedom in making inquiries and investigations, and is less bound by the restrictions observed by ordinary Civil and Revenue Courts, in matters of procedure, is such an officer to be regarded as acting not in a judicial capacity, but only as an executive or administrative officer?

The Legislature may exempt some Courts dealing with a particular kind of litigation, from the observance of the ordinary procedure prescribed for Courts, and invest them with some extraordinary and even summary powers of disposal. They do not, for that reason, cease to be Courts. There are, no doubt, some peculiar features in the exercise of the functions by the Revenue Officer appointed under Chapter XI of the Act for the settlement of rents. Are they really repugnant to the idea of his being a Court exercising judicial power (as defined in the Privy Council decision above referred to)? It seems that though an application is made under S. 168 (1) by the ryots owning not less than one-fourth of the total extent of the holdings in the village, the Revenue Officer, if appointed by the Government, for the purpose of settlement of rent, may settle fair and equitable rents for the whole village. There is provision even in the Code of Civil Procedure, enabling one or more persons to sue on behalf of numerous persons having the same interest, with the Court's permission. In such a suit, if a decision is given, it affects even persons who are not actually parties to the suit or who take no part in the conduct of the suit. S. 170 (3) of the Act provides for the incorporation of the rates settled, after sanction by the confirming authority, in the record-of-rights published under sub-sec. (2) of S. 166 (which may be deemed to be a document prepared by an executive officer). But even all orders or decrees of Civil Courts passed in suits under S. 173 should be similarly incorporated in the said record-of-rights (*vide* S. 174). I am therefore constrained to observe that the decisions of the Revenue Officer, in the matter of settlement of rents, which seem to be not open to question as regards the correctness of the rates finally fixed, by means of a civil suit under S. 173 of the Act, and which have, therefore, the force of *res judicata* in any subsequent proceeding between the landholder and the ryots in a Civil or Revenue Court, cannot be easily distinguished from those given by Courts, as between parties seeking their civil rights.

On a due consideration of the provisions in Chapter XI relating to the settlement of rent as compared with other provisions in the Act and also of certain fundamental principles which serve as indicia for determining the character of the tribunal, I am of opinion that the Revenue Officer settling fair

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and equitable rents on an application under S. 168 of the Act cannot be deemed to be an executive or administrative functionary. I am inclined to hold that such an officer as also the appellate or revisional authority in the same matter must be deemed to be a Revenue Court and in the sense in which their Lordships of the Privy Council have defined a Civil Court in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3], it should be viewed also as a Civil Court.

If the Revenue Board in deciding an appeal under S. 171 or exercising the powers of revision under S. 172 be deemed to be acting as a judicial tribunal, or as a Revenue Court, then has the High Court power to revise the order of the Revenue Board passed under S. 172? If the Board be a Revenue Court, I am clear that the High Court has no power under S. 115 of the Code of Civil Procedure to revise such an order of the Revenue Board. By virtue of the provisions in S. 192 of the Estates Land Act, not only should S. 115 of the Code be deemed to apply to all suits, appeals and other proceedings under the said Act, but also Ss. 3 and 5 of the Code. Under S. 115 of the Code the High Court may revise any decision by any Court subordinate to such High Court and against which no appeal lies thereto, provided the prescribed conditions for exercising the revisional jurisdiction are shown to exist. Unless the Board of Revenue acting as a Revenue Court is subordinate to the High Court within the meaning of S. 3 of the Code, the High Court cannot exercise its powers of revision under S. 115. S. 3 of the Code makes Civil Courts only as subordinate to the High Court and though this section is not exhaustive, there is nothing else in the Code by which we can hold that a Revenue Court is also subordinate to the High Court. On the other hand a distinction is maintained in the Code between a Civil Court and Revenue Court of original jurisdiction. A Revenue Court as such is not a Civil Court under the Code of Civil Procedure. But a Revenue Court may be deemed to be a Civil Court within the meaning of S. 16 of the Letters Patent, if regard be had to the definition given by their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3]. Under S. 16 of the Letters Patent, the High Court of Judicature at Madras shall be a Court of Appeal from the Civil Courts

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 (P. C.).

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of the Presidency of Madras and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force. If the Board of Revenue is a Civil Court as defined in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3] when deciding any matter under Ss. 171 and 172 of the Estates Land Act, there is no difficulty in arriving at the conclusion under S. 16 of the Letters Patent that the Revenue Board is subordinate to the High Court. The High Court being a Court of Appeal from all the Civil Courts of the Presidency, it must be deemed to be superior to all such Civil Courts, whether or not it can exercise appellate jurisdiction over every order or decree passed by such Civil Courts. To entertain appeals from the decisions of such Civil Courts, there must be provision by virtue of any law or regulation in force. But the High Court would still be regarded as a Court of Appeal from all the Civil Courts of the Presidency and that would create a link between any Civil Court and the High Court as inferior and superior Courts. Moreover S. 107 of the Government of India Act declares that the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. This is only in conformity with what is provided for in S. 16 of the Letters Patent. Even though the Revenue Board may be deemed to be strictly a Revenue Court, it should in my opinion be deemed to come under "all other Courts subject to its superintendence" in S. 16 of the Letters Patent. By virtue of S. 192 of the Estates Land Act, Order 46 of the Code of Civil Procedure dealing with reference of questions to the High Court must be taken to apply to all suits, appeals and other proceedings under the Estates Land Act. It is true that the Board of Revenue may or may not choose to make a reference to the High Court. But if any reference has to be made at all, it must be made only to the High Court. That is one indication of the Revenue Board being a subordinate tribunal. Another indication is also furnished by the fact that the High Court has the power to make rules under S. 202 of the Estates Land Act with the approval of the Local Government to be followed by all the Revenue Courts in dealing with

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 (P. C.).

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matters arising under the Estates Land Act. The authority to make rules for the guidance of all Revenue Courts indicates at least a power of superintendence over such Courts. These are no doubt some indications to show that the High Court has at least the power of superintendence over the Board of Revenue when acting as a Revenue Court and passing orders under S. 171 or 172 of the Estates Land Act. The fact that there is no provision in the Estates Land Act constituting the High Court as a revisional authority over the Board of Revenue in any specified matters, either expressly or by implication, is not of much avail to the respondents in this case, because the local Legislature cannot by means of any Act passed by it take away the jurisdiction already possessed by the High Court under S. 16 of the Letters Patent or S. 107 of the Government of India Act. It is only by an Act of Parliament or by the exercise of the legislative powers of the Governor-General in Council that any interference with the powers of the High Court conferred by the Letters Patent can be made. That the Estates Land Act does not confer any powers of revision on the High Court over the orders of the Board of Revenue will not really affect the revisional jurisdiction of the High Court possessed by it otherwise. I have not thought it necessary to discuss this question with reference to the case-law as this aspect has been elaborately considered in the judgments of both the learned referring Judges. It is true that S. 115 of the Code of Civil Procedure does not help the petitioner in this case, nor is there any provision in the Estates Land Act itself investing the High Court with revisional power. If the Revenue Board in deciding questions regarding the settlement of rent under S. 171 or S. 172 of the Estates Land Act be a Revenue Court subject to the superintendence of the High Court or a Civil Court in the Presidency of Madras within the definition given in *Nilmoni Singh Deo* v. *Taranath Mukerjee*[3], there is no doubt that under S. 16 of the Letters Patent and S. 107 of the Government of India Act, the High Court has jurisdiction to revise the orders of the Board of Revenue, and this Revision Petition cannot be dismissed *in limine* as unsustainable. My opinion, therefore, is that the High Court has jurisdiction to entertain this petition.

3. (1882) L. R. 9 I. A. 174: I. L. R. 9 C. 295 (P. C.).

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By Court.—In the result C.R.P. No. 192 of 1926 will be dismissed with costs. Fee Rs. 750. Memorandum of cross-objections and the connected C.R.P. No. 1109 of 1926 are dismissed.

S. R. *Reference answered in the negative and petitions dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of New South Wales.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR JOHN WALLIS.

The Australian Investment Trust, Ltd. .. *Appellants**

v.

The Strand and Pitt Street Properties, Ltd. .. *Respondents.*

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*Company—Shares—Underwriting agreement—Payment of commission to underwriter—Validity of agreement—*Ultra vires—*Indian Companies Act* (*VII of* 1913), *S.* 105.

Though a payment by a company of a brokerage to brokers for "placing" its shares with other persons is legitimate, an agreement by a company to pay a commission to a person in consideration of his subscribing *in praesenti* for a definite number of shares in the company's capital would be *ultra vires* the company. It is equally beyond the powers of the company to enter into an underwriting agreement whereby the underwriter agrees to take up by way of subscription in a new company or a new issue a certain number of shares if and so far as not applied for by the public, for a commission to be paid by the company.

Ooregum Gold Mining Company of India v. *Roper*, (1892) A. C. 125; *Gorrissen's Case*, (1873) 8 Ch. App. Cases 507 at 515 and *Metropolitan Coal Consumers' Association* v *Scrimgeour*, (1895) 2 Q.B. 604, referred to.

In re *Licensed Victuallers' Mutual Trading Association*, Ex parte *Audam*, (1889) 42 Ch. D. 1, distinguished.

Appeal No. 116 of 1931 from an order, dated 9th April, 1931, of the Supreme Court of New South Wales in its equitable jurisdiction.

The facts are fully stated in their Lordships' judgment.

Gavin T. Simonds, K. C. and *J. H. Stamp* for appellants.

F. D. Morton, K. C. and *G. A. Rink* for respondents.

7th July, 1932. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal brought pursuant to leave granted by the Supreme Court of New South Wales from an order, dated the 9th April, 1931, of that Court in its equi-

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table jurisdiction (Long Innes, J.), allowing the respondents' demurrer to the appellants' statement of claim in the action.

In the action the appellants are seeking to have the share register of the respondents rectified by the deletion therefrom of the name of the appellants as the holders of 16,308 shares of £1 in the capital of the respondents.

The question at issue is whether an underwriting agreement made on the 15th April, 1929, and subsequently adopted by the respondents pursuant to which the shares in question were allotted to the appellants is, as the appellants allege, *ultra vires* the respondents.

Both parties to the appeal are companies limited by shares incorporated in New South Wales under the provisions of the New South Wales Companies Acts, 1899 to 1918.

The New South Wales Companies Acts, 1899 to 1918, contain no provision expressly authorising the payment of underwriting commissions such as that first introduced in England by S. 8 of the Companies Act, 1900, and now embodied in S. 43 of the Companies Act, 1929[1], and both sides agree that the law applicable in New South Wales to the question involved in this appeal can be treated as identical with that which prevailed in England before S. 8 of the Companies Act, 1900, came into operation.

It is upon a consideration of the English law as it stood before S. 8 of the Companies Act, 1900, came into operation, that the learned Judge in the Court below reached his conclusion, and that their Lordships have now to determine the appeal.

The facts as appearing in the statement of claim demurred to are in effect as hereinafter stated.

On the 15th April, 1929, by means of two letters the first from the appellants to one Keith Williams as trustee for a company then about to be formed and registered and the other from Keith Williams to the appellants an agreement for the underwriting by the appellants of a proposed issue of capital of the proposed company was entered into.

The first of such letters was as follows:—

"STRAND & PITT STREET PROPERTIES LIMITED.

(A Company about to be formed and registered under the provisions of the New South Wales Companies Acts, 1899—1918, and herein referred to as 'the Company').

1. In terms identical with S. 105 of the Indian Companies Act (VII of 1913).—S. R.

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CAPITAL: £250,000 in 250,000 Shares of £1 each.

To KEITH WILLIAMS, Esquire,

17, O'Connell Street,

Sydney, N.S.W.

(as trustee for the Company).

Sir,

1. With reference to the proposal to offer one hundred and seventy-five thousand ordinary shares in the Company to the public for subscription at One pound per share and for the considerations hereinafter mentioned THE AUSTRALIAN INVESTMENT TRUST LIMITED a Company formed and incorporated under the New South Wales Companies Acts and carrying on business at Sydney aforesaid (hereinafter referred to as 'the Trust') hereby underwrites the whole of the said One hundred and seventy-five thousand shares so to be offered with a right to make a firm and irrevocable application for sixty thousand of such shares.

2. The Trust's application and subscription are to be on the terms of the Company's prospectus to be finally settled and issued PROVIDED ALWAYS that it shall be issued within sixty days from the date hereof and that such Prospectus as finally settled and issued does not differ in any material particular from the draft prospectus as now published a copy of which is annexed hereto and signed by Frederick John Leslie Dunlop on behalf of the Trust.

3. The Trust's firm application for sixty thousand shares or any part thereof if and when made is to be viewed as marked in relief of its underwriting and in respect to such underwriting the Trust or its nominee is not to be allotted any greater number of shares than the number which it has underwritten.

4. All applications which may be initialled by or for the Trust and (subject to that which is hereinafter mentioned) approved by you and sent in by the Trust to you or to the Company prior to the time fixed by the prospectus for closing the list of subscribers are to be applied primarily in relief of the Trust's underwriting and shall not be reckoned as subscriptions by the public ALWAYS PROVIDED that prior to such closing due notice is given to you by the Trust that it requires such initialled applications to be so applied as in relief of its own application.

5. All such applications as are mentioned in the last preceding paragraph shall be approved and accepted by the Company provided that they are presented on a form of application approved by the Company that the applicants are responsible persons and that the applications are accompanied by application moneys according to the terms of the Prospectus. In the event of any dispute arising as to whether any applicant is a responsible person every applicant shall be deemed to be a responsible person if any Bank be of opinion that such applicant is a responsible person or company to take up the number of shares applied for.

6. The Trust hereby irrevocably authorises you or the company by any one of its officers in the name or on behalf of the Trust to sign and put in an application in the form referred to in the Prospectus as published for the number of shares underwritten by the Trust and to take an allotment in its name in respect thereof and the Trust hereby agrees to pay to the Company the application and allotment moneys immediately after receiving notice of allotment.

7. Subject as hereinafter mentioned the Company shall within fourteen days after it shall have become entitled to commence business pay to the Trust a commission in cash of one shilling per share on the shares hereby underwritten including those firmly applied for by it but no commission is

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payable until the application moneys payable on the shares have been paid to the company and notice of allotment given to the applicant.

8. No allotment to the Trust is to be made before the expiration of seven days after the first issue of the Prospectus.

9. The obligations of the Trust hereunder are to hold good notwithstanding any variation between the draft Prospectus annexed hereto and the Prospectus as finally settled and published provided that the amount of the capital of the Company, namely, two hundred and fifty thousand pounds divided into two hundred and fifty thousand shares of one pound each, is not altered and that the terms of subscription, namely, five shillings per share on application, five shillings per share on allotment and the balance in calls of not more than five shillings per share at intervals of not less than three months are not altered and provided further that such Prospectus as finally settled and published does not differ in any material particular from the draft Prospectus attached hereto.

10. You are to be at liberty on behalf of the Trust to concur with the Company in making a contract under which the Company is to take your place for the purposes hereof and thereupon you will be released from any liability hereunder.

11. Any notice to the Trust may be served by sending the same by post addressed to the Trust at the address under stated and shall be deemed to be served on the day following that on which it is posted.

Be so good as to notify the Trust of your Acceptance of this proposal.

Dated this Fifteenth day of April, 1929.

THE AUSTRALIAN INVESTMENT TRUST, LIMITED.

Signature: F. J. L. DUNLOP, Managing Director.

Address: Brook House, 17, O'Connell St, Sydney."

The second letter was as follows:—

"ACCEPTANCE OF UNDERWRITING PROPOSAL.

STRAND AND PITT STREET PROPERTIES LIMITED

(A Company about to be formed and registered under the provisions of the New South Wales Companies Acts, 1889—1918.)

CAPITAL: £250,000 in 250,000 Shares of £1 each.

THE AUSTRALIAN INVESTMENT TRUST, LIMITED,
17, O'Connell Street,
Sydney.

Dear Sirs,

Referring to your letter to me of the Fifteenth day of April 1929 proposing to underwrite One hundred and seventy-five thousand ordinary shares of One pound each in the abovenamed company I HEREBY as Trustee for the Company Strand and Pitt Street Properties Limited AGREE to accept same upon the footing and subject to the conditions referred to in your said letter.

Dated the Fifteenth day of April, 1929.

KEITH WILLIAMS,
Trustee for the proposed Company."

The respondents (the Company contemplated by the letters of the 15th April, 1929) were duly incorporated on the 23rd

April, 1929, with a capital of £250,000 divided into 250,000 shares of £1 each.

A prospectus was issued offering 175,000 shares for public subscription. This prospectus which presumably was substantially identical with the draft prospectus copy of which was annexed to the first letter of the 15th April, 1929, contained (*inter alia*) the following passages:—

" UNDERWRITING AGREEMENTS.

A copy of the underwriting agreement, dated Fifteenth of April 1929, between Keith Williams as trustee for Strand and Pitt Street Properties Limited of the one part and The Australian Investment Trust Limited of the other part may be inspected at the offices of Messrs. Alfred Rofe & Sons, Solicitors to the Company, Rofe Chambers, O'Connell Street, Sydney.

A clause in the former agreement meaning thereby the underwriting agreement provides that the underwriters shall have the right to make firm application for and be allotted 60,000 of the shares now offered for subscription.

BROKERAGE.

The underwriters will pay a brokerage of 6*d.* per share on allotments in respect of applications identified as coming through members of any recognised Stock Exchange. The directors reserve the right to reject any application without giving reasons therefor."

On the 11th June, 1929, by an agreement in writing between the appellants, Keith Williams and the respondents, the agreement contained in the two letters of the 15th April, 1929, was duly adopted by the respondents and made binding on the appellants and respondents, and Keith Williams was discharged from liability thereunder.

On the 30th June, 1930, the appellants set up that the underwriting agreement was, *ultra vires*, the respondents and unenforceable.

On the 9th October, 1930, the respondents, in pursuance of the underwriting agreement, allotted to the appellants 16,308 shares of £1 each in the capital of the respondents.

On the 29th October, 1930, the appellants filed the statement of claim in the suit out of which this appeal arises, alleging that the taking up of any of the shares pursuant to the underwriting agreement involved payment by the respondents out of their share capital of commission in respect of such shares, and claiming to have the share register rectified by the deletion therefrom of the name of the appellants as the holders of any of the 16,308 shares.

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The respondents demurred *ore tenus* on the 9th April, 1931. Mr. Justice Long Innes, in a valuable judgment in which the authorities are carefully reviewed, and which has been of much assistance to their Lordships, reached the conclusion that the demurrer should be allowed. At the same time, the learned Judge gave the appellants liberty to amend the statement of claim within 21 days, and ordered that in default of amendment within that time the suit should be dismissed.

Leave to appeal to His Majesty in Council was subsequently obtained from the Supreme Court of New South Wales.

The decision of the House of Lords in *Ooregum Gold Mining Company of India* v. *Roper*[1] made it plain that a company limited by shares could not issue its shares as fully paid up for a money consideration less than their nominal value.

In his speech in that case Lord Watson at p. 136 after referring to the relevant sections of the Companies Act, 1862, said:

> "In my opinion these enactments read together indicate the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value"

and later on he said:

> "Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of this statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance when duly called for. A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the Company has agreed to accept as representing in money's worth the nominal value of the shares."

The difference between subscribing for shares and placing shares had been previously well explained by Lord Justice Mellish in *Gorrissen's* case[2] where he said:

> "It appears to me that an agreement to place shares, even although the person making it binds himself that within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares then by agreeing to take shares he does at that moment become a shareholder and the company are entitled and are indeed

1. (1892) A. C. 125.
2. (1873) 8 Ch. App. 507 at 515.

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bound at that moment to put him on the register. But if he agrees to place shares he does not agree to become a shareholder nor are the company entitled to put him on the register as a shareholder but he simply agrees that he will procure other persons to take the shares."

The principles indicated in the foregoing quotations are in no respect impinged upon by the decision that payment by a company of brokerage to brokers for placing its shares with other persons is legitimate (see *Metropolitan Coal Consumers' Association* v. *Scrimgeour*[3]).

The point as to the validity of commission paid by a company to a person for subscribing for or underwriting its share capital was however never clearly decided in England before the passing of the Companies Act, 1900, unless as has been urged before their Lordships such a decision is to be found in the case of In re *Licensed Victuallers' Mutual Trading Association,* Ex parte *Audain*[4], which will be examined presently.

Upon this point of commission Lord Lindley in the Sixth Edition of his work on Companies published in 1902 at p. 43 expressed himself as follows:—

"After some doubt it was decided before the Companies Act, 1900, was passed that a limited company might pay a reasonable sum to brokers by way of brokerage for placing its shares but the better opinion seems to have been that such a company could not make any payment out of capital to a person for subscribing for or underwriting its shares."

When the matter was before the Judge below the parties agreed that for the purpose of construing the letters of the 15th April, 1929, the word "underwrite" should be taken to mean "to agree to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public." This is a definition which seems to express accurately the meaning of the word underwrite in the sense in which it is commonly used.

Now it is not disputed that an agreement by a company to pay a commission to a person in consideration of his subscribing *in praesenti* for a definite number of shares in the company's capital would be *ultra vires* the company. It would in effect be an arrangement whereby he was allowed a rebate or discount on the amount payable by him for the shares for which he agreed to subscribe.

3. (1895) 2 Q. B. 604.

4. (1889) 42 Ch. D. 1.

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But it is said that the position is different where as in an underwriting agreement, on the one hand, the obligation of the subscriber is to subscribe only for such number of shares, if any, as the public may not take up, so that in the result he may not be under liability to subscribe for any share at all, while, on the other hand, the consideration for the obligation to subscribe, namely the commission, is payable in any event and is not in amount related to the number of shares, if any, which ultimately have to be taken up under the agreement.

For the purpose of determining whether such an underwriting agreement is within the powers of the company their Lordships are content to apply the test suggested by Lord Watson in the passages already quoted from his speech in *Ooregum Gold Mining Co. of India* v. *Roper*[1]. What are the services rendered by the underwriter in return for the commission over and beyond his agreement to subscribe for shares? In their Lordships' opinion the answer must be that there are none.

In the case of an agreement to subscribe for a definite number of shares *in praesenti* it could not be suggested that there was any consideration for the commission beyond the agreement to take shares. What further obligation is imposed on the underwriter or what further service does he undertake to render because the number of shares (if any) which he becomes bound to take up depends upon a contingency, namely, the course the public will take in regard to the issue?

The learned Judge below has said:

"In substance an underwriting agreement is a contract of guarantee or indemnity whereby the underwriter in effect guarantees that the whole of the shares in question will be subscribed by undertaking that to the extent to which they are not otherwise subscribed he will apply for them himself. It is in effect equivalent to a contract of insurance and might be expressed as such."

With all respect to the learned Judge their Lordships are of opinion that the ambit of the obligation of the underwriter cannot be altered or enlarged by changing the language by which the contract is described. The obligation in fact is and remains nothing more or less than an obligation to subscribe for shares in the company. It is true that it is an obligation to subscribe for shares only on the happening of a contingent event the

1. (1892) A. C. 125.

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number if any of the shares to be taken up depending upon the magnitude of the event, but this is an obligation of the same nature as an obligation to subscribe for a definite number of shares *in praesenti* though of more uncertain burden until it is crystallised by the happening of the contingency.

In both cases the commission is agreed to be paid to induce the same thing, namely, the undertaking of the obligation to subscribe. No other service than undertaking this obligation is in either case rendered by the receiver of the commission. In both cases he in effect receives from the company a discount or rebate upon the amount payable upon the shares which he has to take up. It cannot make any difference that under the underwriting agreement he may not in the event have to take up any share and may yet get his commission all the same.

It is true that the benefit to the company of an underwriting agreement may be great but to resolve the question now under consideration the benefit to the company is not a relevant matter. The solution must be found in the obligation undertaken by the underwriter.

It has however been contended before their Lordships that this view of the matter is inconsistent with the decision of the English Court of Appeal to which Lord Lindley (then Lord Justice Lindley) was a party in In re *Licensed Victuallers' Mutual Trading Union*, Ex parte *Audain*[4]. Two points only were decided in that case. *First*, after hearing expert evidence the Court determined the meaning of the term "underwriting" and *secondly*, the Court held that the phrase in the underwriting agreement "at 15 per cent. discount" did not mean discount but commission. The question whether an agreement to underwrite shares for a commission was *intra vires* or *ultra vires* the company does not appear to have been argued by counsel or considered by the Court. Their Lordships are therefore unable to obtain any assistance from this decision.

The reference in the prospectus in the present case to payment of brokerage by the underwriters (a matter not mentioned in the underwriting agreement) does not in their Lordships' opinion affect the matter. Applying the considerations which have been already indicated their Lordships reach the conclusion that the learned Judge below was in error in allowing the demurrer and that the appeal must succeed. The order of

4. (1889) 42 Ch. D. 1.

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Lord Tomlin.

Mr. Justice Long Innes should be discharged and in lieu thereof the demurrer of the respondents should be dismissed and their Lordships will humbly advise His Majesty accordingly.

The costs here and below will be borne by the respondents.

Solicitors for appellants: *Ashurst Morris Crisp & Co.*

Solicitors for respondents: *Gwyn Davies & Co.*

S. R. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Vedathanni .. *Petitioner** (*Assessee*).

v.

The Commissioner of Income-tax, Madras .. *Respondent* (*Referring Officer*).

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Vedathanni *v.* The Commissioner of Income-tax, Madras.

Income-tax Act (*XI of* 1922), *S.* 14 (1)—"*Member*"—*Widow of deceased coparcener—Maintenance received by—Assessability—Family reduced to single male member, nevertheless a joint family.*

The widow of a deceased coparcener is a "member" of the undivided family of her husband.

Even where the family is reduced to a single male member, there is still a joint family, at any rate, where there are a number of widows and other persons entitled to maintenance from him.

Maintenance and arrears of maintenance received by a widow of a deceased member of an undivided family is exempt from taxation under S. 14 (1) of the Income-tax Act.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act, XI of 1922 (hereinafter referred to as the Act).

The petitioner is the widow of the late Ramalinga Mudaliar of Vadapathimangalam, residing at Kalapal within the jurisdiction of the Income-tax Officer, Tanjore Circle. She is assessed on her

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*O. P. No. 114 of 1931. 11th May, 1932.

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income from business, *viz.*, money-lending and 'other sources,' *viz.*, maintenance allowance. Her accounts are kept on the cash basis. The assessment out of which the present reference arises is that made on her for the year 1930-31, based on her income of the "previous year" which in this case is the calendar year ended 31st December, 1929.

The petitioner's husband, the said Ramalinga Mudaliar of Vadapathimangalam and his elder brother Somasundara Mudaliar were members of a Hindu undivided family owning extensive landed and other properties in the Tanjore District. Ramalinga Mudaliar died issueless in December, 1912, leaving behind him his widow, the present petitioner, and his sole surviving brother Somasundara Mudaliar on whom the entire estate of the family devolved by survivorship. Some time after the death of her husband, *i.e.*, in January, 1914, the petitioner left the family house and has ever since been living separately. She was from that date demanding maintenance from her husband's coparcener, Somasundara Mudaliar, but Somasundara Mudaliar died in January, 1925, without making any provision for her maintenance. He left behind him two widows, and one of them acting on the authority given to her by her husband in this behalf adopted a son in July, 1925. The petitioner then brought a suit against the adopted son and the two widows of her husband's brother claiming arrears of maintenance from January, 1914 to June, 1925, at the rate of Rs. 10,000 per annum. The defendants resisted the petitioner's claim on the strength of a document (*Vyavastha patram*) executed by the petitioner in favour of Somasundara Mudaliar within a few days after her husband's death in December, 1912, by which she admitted the undivided status of the family of which her husband and his brother were members and relinquished her right to maintenance in consideration of certain items of landed and other properties devised to her therein for life. The Subordinate Judge, Negapatam, believed the petitioner's allegation that the release deed was neither intended to be, nor was ever acted upon or given effect to at any time as a maintenance deed by the parties thereto. He therefore entered judgment for the petitioner and decreed to her on the 14th February, 1929, a sum of Rs. 69,000 as arrears of maintenance allowance (at the rate of Rs. 6,000 only per annum for a period of 11½ years) and Rs. 4,002-12-0 as proportionate costs with interest on the two amounts from the date of the plaint and the date of the decree respectively.

In pursuance of this decree the petitioner received sums aggregating Rs. 87,554 on various dates during the "previous year". The Income-tax Officer allowed a deduction of Rs. 17,314 from

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this sum of Rs. 87,554 as expenditure incurred in the conduct of the suit for the maintenance allowance The balance of Rs 70,240, the Income-tax Officer proposed to include in the assessment made on the petitioner for the year 1930-31. The petitioner stated that an appeal had been preferred by the defendants to the High Court against the decree of the Subordinate Judge and objected to the assessment proposed on the ground that if the decree were to be reversed in appeal the assessment would not be right. (A cross-appeal has been filed by the petitioner against the decree of the Subordinate Judge objecting to the reduction in the rate of the maintenance allowance and claiming the balance of the arrears, *viz.*, Rs. 46,000, disallowed by the Subordinate Judge). The Income-tax Officer overruled this objection for the reasons stated in his order, a copy of which is filed, marked Ex. A.

The petitioner appealed to the Assistant Commissioner without success. A copy of the Assistant Commissioner's order is filed, marked Ex. B.

The petitioner now requires me to refer to the High Court the following questions of law arising out of the Assistant Commissioner's order:—

Question (1).—Whether maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under S. 14 (1) and other sections of the Act.

The petitioner contends that the arrears of maintenance allowance were received by her as a member of the Hindu undivided family and are therefore covered by the exemption in S. 14 (1) of the Act. The question that arises for the decision of their Lordships is whether the widow of a deceased coparcener is a member of the Hindu undivided family of her late husband within the meaning of that section. I am of opinion that the word "member" here means "coparcener" and that this section is intended to exempt the receipt by a coparcener of his share of the joint family income and not receipts by females who are mere dependants of the family. It is urged on behalf of the petitioner that the word "member" in this section means and includes not only "coparceners" but also persons who possess any lesser right or interest than coparceners in the properties of the Hindu undivided family. It has been represented to me that at one time the rights of a son's wife or widow amounted to membership of the family with an interest in the family property. But modern judicial decisions have, I understand, modified the law as laid down in the Smriti texts. The effect of those decisions is that the petitioner cannot be said, on the facts of this case, to be a member of a Hindu undivided family. Nor can it be said that she received the

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maintenance allowance as a member of a Hindu undivided family for the widow of a deceased coparcener in an undivided family would be entitled to receive maintenance from the surviving members of the family although such members become divided subsequently to her husband's death. This shows that the maintenance paid to the widow of the deceased coparcener might be paid even when there is no undivided family in existence; and therefore the recipient cannot be said to receive it by reason of her membership in a Hindu undivided family. In my opinion, therefore, the sum in dispute is not exempt under S. 14 (1) of the Act.

Question (2).—Whether maintenance and arrears of maintenance received by a widow of a joint undivided Hindu family is income, or profits or gains.

The petitioner's contention in this question seems to be that the lump sum decreed to her by the Court as and for arrears of maintenance is not income, profits and gains within the meaning of S. 4 of the Act but a capital receipt not liable to be taxed under the Act. That the receipts on account of maintenance allowance constitute income under the Act and that the arrears of such allowance are rightly taxable are propositions the correctness of which was presumed by this Court in the case of *Zemindarini of Tiruvur*, 3 I. T. C. 428. I do not see that there is any distinction between the case now under consideration and the one cited above to warrant a different conclusion in this case.

Question (3).—Whether maintenance and arrears of maintenance received by a widow of a joint undivided Hindu family by a decree through Court from which an appeal is pending is assessable.

The Act imposes a charge on an individual's income, profits and gains of the "previous year" as described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India. The petitioner received the arrears of maintenance during the "previous year" in pursuance of the decree of Court; such arrears of maintenance when received are her income, and liability attaches to such income irrespective of what took place before and what is to take place thereafter. The fact that the decree awarding maintenance is the subject-matter of further litigation which is pending can neither alter its character as income nor reduce her interest in it, nor affect her present liability.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for petitioner (Assessee).

M. Patanjali Sastri for respondent (Commissioner of Income-tax).

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Ramesam, J.

The judgment of the Court was delivered by

Ramesam, J.—The first question referred to us by the Income-tax Commissioner is :

"Whether maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under S. 14 (1) and other sections of the Act."

The facts of the case may be briefly stated. The Vadapathimangalam family in East Tanjore District consisted of two brothers up to 1912, Somasundara and Ramalinga. Ramalinga died in December, 1912, leaving a widow. She is the assessee in this case and the reference to us was made at her instance. Somasundara died in January, 1925, leaving two widows. In July, 1925, an adoption was made to him. The adopted son, a minor, is now the sole male member of the family and holds the estate. Ramalinga's widow sued him for maintenance with arrears. The Subordinate Judge of Negapatam gave her a decree for maintenance at the rate of Rs. 6,000 per annum and for arrears amounting to Rs. 69,000. There was an appeal to the High Court. On appeal, the decree was confirmed by our brothers Curgenven and Sundaram Chetty, JJ. We are informed that leave to appeal to the Privy Council has been granted, but it is not necessary that this reference should wait till the Privy Council appeal is disposed of.

On the first question referred to us, the Commissioner stated his view as follows:—

"It has been represented to me that at one time the rights of a son's wife or widow amounted to membership of the family with an interest in the family property. But modern judicial decisions have, I understand, modified the law as laid down in the Smriti texts. The effect of those decisions is that the petitioner cannot be said, on the facts of this case, to be a member of a Hindu undivided family. Nor can it be said that she received the maintenance allowance as a member of a Hindu undivided family for the widow of a deceased coparcener in an undivided family would be entitled to receive maintenance from the surviving members of the family although such members become divided subsequently to her husband's death."

The Commissioner has not referred to any actual decisions. So far as the Hindu Law is concerned, there is little scope for any doubt. As to text-books, it is enough to refer to Strange's Hindu Law, Vol. I, page 171, where widows entitled to maintenance are referred to as dependent members of the family; Mayne's Hindu Law, S. 270, second paragraph; G. C. Sarkar's Hindu Law, 6th Edn., page 294, where female members of a joint family are enumerated inclusive of widows of male members, and Mulla's Hindu Law, page 550. It is enough to refer to the decision of the Privy Council in *S.V.P. Raghunanda Deo*

v. *S.B.K. Patta Deo*[1]. But this point does not require any elaboration as it is practically conceded by the learned advocate appearing for the Commissioner. But he contended that where the family has been reduced to a single male member, though there are a number of widows of deceased coparceners and other persons entitled to maintenance from him, there is no joint family. This is not the question referred to us by the Commissioner who assumes that there is an undivided Hindu family in the case. But even this contention I do not think is tenable. The passage already referred to from Mulla's Hindu Law relying on *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*[2] and the Privy Council decision in *Bachoo Hurkisondas* v. *Mankorebai*[3] shows that there can be a joint family with a single member provided there are other members entitled to maintenance from the estate. It is unnecessary for us to express any opinion in this case on

(1) cases where there is a single male member and there are no widows of deceased coparceners entitled to maintenance;

(2) cases where the surviving male members effect a partition between themselves while continuing to pay maintenance to widows of deceased coparceners.

So far as the case before us is concerned, undoubtedly there is a joint family and also the petitioner in this case is entitled to maintenance as the widow of a deceased coparcener, and receives it as member of an undivided Hindu family.

The only further question that arises is, whether there is anything in the Income-tax Act which produces anomalous results if we adopt the above construction. Far from there being any anomaly we find the result is consonant with justice and purposes of the Act. The object and scope of S. 14 is to prevent the Crown from taxing twice over. If there is any section in the Act which enables the holder of the estate in making his return to deduct the amounts of maintenance paid by him to the widows of deceased coparceners, then the effect of the above construction would be to prevent the Crown from taxing the income even once. But it is admitted before us that there is no such provision in the Act. If widows are not

1. (1876) L. R. 3 I. A. 154 : I. L. R. 1 M. 69 at 81 (P.C.).
2. (1891) I. L. R. 18 Cal. 385.
3. (1907) L. R. 34 I.A. 107 : I. L. R. 31 Bom. 373 : 17 M. L. J. 343 (P.C.).

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Ramesam, J.

exempted by reason of the above construction, the Crown would undoubtedly be taxing twice over. Our construction makes the result consistent with the equities of the case.

Another contention referred to before us by the learned advocate is that the sole male member now holding the joint family property would himself be exempt from any taxation. I am unable to agree with this suggestion. He cannot be said to receive the income of the estate as member of an undivided family. He receives his income by reason of business or investment or from some other source. He does not receive the income from any other person by reason of his being a member of a joint family. The language of the section is strictly applicable only to widows of deceased coparceners, to disqualified heirs and maidens in the family receiving maintenance. This contention therefore is not tenable. I say nothing in this case about super-tax from a Hindu joint family.

The result is that the first question should be answered in favour of the petitioner. If this is answered, the other two questions do not arise.

My Lord the Chief Justice and Cornish, J., agree.

The petitioner will have his costs of this petition, viz., Rs. 250.

His deposit of Rs. 100 will be refunded to him.

S. R. *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Alagappa Chetty, minor, by guardian Valliamma Achi .. *Appellant** (*2nd Defendant*)

v.

Al. Al. N. Narayanan Chettiar .. *Respondent* (*Plaintiff*).

Alagappa Chetty *v.* Narayanan Chettiar.

Negotiable Instruments Act (*XXVI of* 1881), *S.* 17—*Stamp Act* (*II of* 1899), *Ss.* 6, 35, 36 *and* 42 (2)—*Negotiable instrument—Holder's right to elect under S.* 17—*Whether taken away by S.* 6 *of Stamp Act—Document —Insufficiency of stamp—Admissibility—Appellate Court's right to refuse to act upon it after it was admitted once in evidence in trial Court—Scope of S.* 42 (2).

The right of election given by S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of

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*S. A. No. 516 of 1929. 26th July, 1932.

exchange, is a privilege which he must have the full advantage of, and that benefit should not be taken away by anything contained in the Stamp Act. It would be reasonable to read S. 17 of the Negotiable Instruments Act as a proviso to S. 6 of the Indian Stamp Act.

Once a document has been admitted in evidence by the Lower Court under S. 35, such admission cannot be questioned at any later stage of the same suit or proceeding on the ground that the instrument has not been duly stamped and the natural consequences of that admission, which have become final, must also follow. The appellate Court cannot say that though it has been marked as an Exhibit in the case, it would not look into it and would not make use of it in the appreciation of evidence or would not allow a decree to be passed on such a document. Even if S. 6 of the Stamp Act should be held to govern this case, the provisions of S. 36 of the Act preclude this Court from refusing to act upon this document.

Rung Lal Kalooram v. *Kedar Nath Kesriwal*, (1921) 27 C. W. N. 513 and *Joyma Bewa* v. *Easin Sarkar*, (1926) I.L.R. 53 Cal. 515 at 520, referred to.

Section 42 (2) has no application to a case where no duty and penalty have been levied in respect of a document by the Lower Court.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Devakottai in Appeal Suit No. 282 of 1928 (A. S. No. 523 of 1928, District Court, Ramnad) preferred against the decree of the Court of the District Munsif of Devakottai in O. S. No. 300 of 1927.

S. Varadachariar and *V. Ramaswami Aiyar* for appellant.

M. Patanjali Sastri and *A. Nagaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—In this second appeal, two questions have been raised and argued before me. The first question is whether the suit document, Ex. B, which has been admitted in evidence by both the Courts below as a hundi, is to be taken as sufficiently stamped and should be admitted in evidence and acted upon. The second question is whether this document is supported by consideration, or in other words, whether there is any legal consideration for it.

As regards the admissibility of this document, it has to be stated that the wording of the document is such as would bring it either under the category of a promissory note or under a bill of exchange which includes a hundi. The Lower Appellate Court says that this document is worded in the way in which hundies are usually written. That seems to be the view of the first Court also. There is, however, no doubt that this document comes also within the definition of a promissory note. At best, it may be said that this is an ambiguous document, as it can be construed either as a promissory note, or a bill of

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exchange. In such a case S. 17 of the Negotiable Instruments Act provides that the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly. The holder in the present case has elected to treat it as a hundi and on that basis filed this suit. If it is to be treated as a hundi, there is no question of insufficiency of stamp, and we must hold that the document has been duly stamped. If by reason of S. 17 this document should be treated by the Court as a hundi for all purposes, there is no difficulty whatever. But it is contended by Mr. S. Varadachariar for the appellant that this instrument can be treated as a hundi by reason of S. 17 of the said Act for the purposes of that Act alone and not for the purposes of the Stamp Act. This contention, if approved, would deprive the holder of the benefit conferred upon him by S. 17. The right of election given to him is a privilege which he must have the full advantage of, and that benefit should not be taken away by anything contained in the Indian Stamp Act. It would be reasonable to read S. 17 of the Negotiable Instruments Act as a proviso to S. 6 of the Indian Stamp Act.

Assuming that that section is not to be affected by the provisions of S. 17 of the Negotiable Instruments Act, we have to see how the position in this case would be. As I have already said, this document is capable of being construed as a promissory note or as a bill of exchange. That being so, under S. 6 of the Stamp Act, it will be chargeable with the higher duty leviable on a promissory note. A stamp duty of 4 annas would be payable as a promissory note, but it bears only a one anna stamp which would be sufficient, if it is a hundi payable on demand. If S. 6 of the Indian Stamp Act is to govern the present case, a difficulty arises in the matter of admitting this document in evidence. Being a promissory note, it cannot be admitted in evidence even by levying the deficient stamp duty and penalty by reason of S. 35 of the Stamp Act. But reliance is placed on the wording of S. 36 of the Stamp Act by Mr. Patanjali Sastri for the respondent, and it is contended that once this instrument has been admitted in evidence by the Court below, such an admission shall not be called in question at any subsequent stage of the suit, on the ground that the instrument has not been duly stamped. S. 35 states that no instrument chargeable with duty shall be admitted in evidence for any purpose or shall be acted upon, unless such instrument

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is duly stamped. The question is, whether the wording of S. 36 is comprehensive enough to include in the term "admission" the necessary consequences of such admission. It is argued for the appellant, that the appellate Court, by reason of S. 36, is precluded only from questioning the admission of such an instrument by the Lower Court, but is at liberty not to act upon it, if it should hold that the document was not duly stamped. Reference was made to sub-sec. (2) of S. 42 of the Stamp Act, which deals with the effect of the endorsement on an instrument in respect of which stamp duty and penalty have been levied. Once the instrument is so endorsed, it shall become admissible in evidence and may be acted upon as if it had been duly stamped from the beginning. That section has no application to the present case as no duty and penalty have been levied by the Lower Court. What the Lower Court did was to treat it as an instrument duly stamped and to admit it in evidence and act upon it. The interpretation of S. 36 as contended for by Mr. S. Varadachariar seems to be a very narrow one. The result of such an interpretation would be to render an instrument admitted in evidence by the Lower Court of no further use whatever to the party at any later stage of the suit. The expression "acting upon an instrument" does not merely indicate the passing of a decree upon such a document. If the Court admits a document in evidence, such document can be made use of by the Court as a piece of evidence in order to come to a conclusion upon an issue in the case or it can be considered for the purpose of understanding the evidence itself in the case. If the admission in evidence by the Lower Court can alone be free from question by the appellate Court under S. 36, the document once admitted in evidence by the first Court would be practically a dead letter and be of no use whatever to the party who wanted to rely upon it. It is difficult to infer that such would have been the intention of the Legislature, when it stated that such admission of an instrument in evidence shall not be called in question at any subsequent stage of the same suit. If such a document happens to be the basis for a suit, the passing of a decree would be one of the modes of acting upon it. The observations of Richardson, J., in the decision in *Rung Lal Kalooram* v. *Kedar Nath Kesriwali*[1] appear to be germane to the present case. The learned Judge observes that once an

1. (1921) 27 C. W. N. 513.

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instrument is admitted in evidence in any proceeding under S. 35 of the Stamp Act, it is available in that proceeding for all purposes as if it had been properly stamped at the outset and that proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction by reason of non-compliance with the Stamp Act. If such an interpretation is not adopted, the purpose with which S. 36 of the Stamp Act was enacted would run the risk of being nullified. The view of Richardson, J., in the said case was also adopted in a later decision of the Calcutta High Court in *Joyma Bewa* v. *Easin Sarkar*[2].

On a comparison of the wording of S. 42 (2) with that of S. 36, it is urged by the learned advocate for the appellant that a distinction between the admission of a document in evidence and the acting upon such a document was recognised by the Legislature. I agree that such a distinction does exist, but the question now is whether the wording of S. 36 can be reasonably construed in the manner set forth above. I am clearly of the opinion that once a document has been admitted in evidence by the Lower Court under S. 35, such admission cannot be questioned at any later stage of the same suit or proceeding on the ground that the instrument has not been duly stamped and the natural consequences of that admission which have become final must also follow. The appellate Court cannot say that though it has been marked as an exhibit in the case, it would not look into it and would not make use of it in the appreciation of the evidence or would not allow a decree to be passed on such a document. Even if S. 6 of the Stamp Act should be held to govern this case, the provisions of S. 36 of the Act preclude this Court from refusing to act upon this document. In any view, therefore, the contention that the suit document is not duly stamped and therefore cannot be acted upon by this Court cannot prevail.

As regards the second question, the finding of both the Courts below is that the instrument in question is borne out by legal and valid consideration. The oral evidence on the plaintiff's side which has been accepted by both the Courts below is to the effect that this hundi came to be executed by the first defendant in favour of the plaintiff's father for Rs. 2,000 in

2. (1926) I. L. R. 53 C. 515 at 520.

pursuance of a partition arrangement entered into between the 1st defendant and his brothers and also their father in accordance with the decisions of certain mediators. As observed by the learned District Munsif the 1st defendant's agreement to pay Rs. 2,000 for the marriage expenses of the plaintiff is one of the terms of the arrangement of partition effected at the instance of mediators, and the plaintiff's consent to accept the terms of the partition in the manner decided by the arbitrators would be a sufficient consideration for the agreement on the part of the 1st defendant to pay this sum for the purpose of the plaintiff's marriage. It is difficult to believe that the 1st defendant promised to pay this sum purely as a matter of grace. There seems to have been some dispute about the other brothers not having brought into the hotchpot their separate earnings. The plaintiff's first witness clearly states that two of the brothers had kept their earnings separate without throwing them into the joint stock, that the 1st defendant was saying that he had thrown his earnings into the family stock and that he should not be asked to pay as much as the other two brothers and for that reason it was decided that he should pay only Rs. 2,000, whereas, each of the other two brothers had to pay Rs. 9,000 to the plaintiff. From this, it is possible to infer that the plaintiff must have set up some claim to the earnings of his brothers which have not been disclosed or brought into the hotchpot and as a compromise of such conflicting claims, the panchayatdars, who knew the family affairs very well, decided that the three brothers should compensate the plaintiff in different sums. It may be that he wanted those sums for the purpose of his marriage. It is difficult to hold upon the evidence that the 1st defendant's promise to pay Rs. 2,000 was a promise made without any consideration and purely as a matter of grace. I am not inclined to differ from the concurrent finding of both the Courts below that the suit hundi is supported by proper consideration.

The second appeal therefore fails and is dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CORNISH.

The Universal Mutual Aid and Poor Houses Association, Ltd., Madras. .*Appellant** (*Respondent*)

v.

A. D. Thoppa Naidu and others .. *Respondents* (*Petitioners*).

Universal Mutual Aid and Poor Houses Assn., Ltd., Madras *v.* Thoppa Naidu.

Company—Winding up—Scheme of interest-free loans or cash bonuses—Prize-winners and amount of prize determined by lot—Lottery—Penal Code (*XLV of* 1860), *S. 294-A—Lottery and wager—Distinction between—Lottery illegal, though only an* annexe *to charitable or philanthropic purposes.*

One of the objects of a Company was stated to be the raising of a donation fund to carry out charitable objects. The fund was raised by the issue of donation certificates to subscribers on payment of Rs. 100 for each certificate. A substantial portion of the interest accruing on the fund so raised was to be utilised every year in granting loans free of interest ranging from Rs. 1,000 to Rs. 10,000 (or cash bonuses ranging from Rs. 500 to Rs 5,000) to 200 donation certificate-holders, the names of the winners as also the amount of the prize to be determined only by means of drawings. The scheme purported to ensure a certificate-holder receiving at least Rs. 500 in respect of his certificate by providing that in the event of the holder not getting a prize in his lifetime, his heirs were to be paid a sum of Rs. 500, called a Death Relief Bonus. But the winning of the other loans or bonuses was purely a matter of chance dependent on the luck of the draw.

Held, that the scheme was a lottery, that in conducting it, the Company was guilty of an offence under S. 294-A of the Penal Code, and that as a substantial part of the business of the Company was illegal, the Company should be wound up.

Sykes v. *Beadon*, (1879) 11 Ch. D. 170 ; *Taylor* v. *Smetten*, (1883) 11 Q. B. D. 207 ; Re *International Securities Corporation, Ltd.*, (1909) 99 L. T. 581, referred to.

Held, further, the fact that the Company was formed for the purpose of benefiting charities and the lottery was merely an *annexe* to the original business did not legalise the scheme.

Leng and Co. ("*Sheffield Telegraph*") v. *Sillitoe*, (1929) 1 K. B. 366, referred to.

A lottery is a distribution of prizes by lot or chance without the use of skill. It is different from a wager. A wager is a contract between two persons that, on the determination of a future uncertain event, one shall win from the other, and the other shall pay or hand over to him, a sum of money or other stake.

Narayana Aiyangar v. *Vellachami Ambalam*, (1927) I. L. R. 50 Mad. 696 : 52 M. L. J. 687 (F.B.), distinguished.

It is not essential to a lottery that there should be a money prize.

On appeal from the judgment of the Honourable Mr. Justice Stone, dated 1st February, 1932 and passed in the

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*O. S. A. No. 8 of 1932. 9th March, 1932.

exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 111 of 1931.

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Winding up.

In the course of his judgment, Stone, J., observed: "In my view, having regard to the Memorandum, the Articles of Association, the advertisements and the terms of the donation certificates, this Company was formed and has been conducted for the purpose of inducing the public to subscribe for tickets called 'Donation Certificates' by representing that ticket holders would in all cases, sooner or later, obtain a prize, that is to say, a free loan, the event determining the occurrence and size of the prize being determined by the chance of a drawing, which drawing would occur from time to time. That appears to me to be essentially a scheme similar to that examined in In re *International Securities Corporation, Ltd.*,[1] a case which I regard as indistinguishable from this on the point, though I think it right to say that in this case I have not been asked to consider and have not been given evidence of fraud as such was present in that case. That however does not affect the question as to whether this Company was formed for an illegal purpose.

" Then it is said, granted the mode here pursued has been illegal, that mode is not necessary in order to carry out the memorandum and when one is considering whether the Company was formed for an illegal purpose, one must consider its formation and not its management. Here the objects as disclosed in the Memorandum are, it is stated, unobjectionable. There is no mention of a drawing, of a lottery, of a prize. Clause (3) (*f*) provides for loans repayable by easy monthly instalments and relief bonuses to heirs, but there is no mention of the loans being interest free or being determined by lot. It is said all these powers can be carried out without illegality. The answer is that it is now admitted that these free loans cannot be determined in any way except by drawings. The further answer is that even if they could, still as was decided in In re *London and County Coal Company*,[2] as explained in In re *Brinsmead*,[3] where there is no *bona fide* intention on the part of the directors to carry on the business in a proper manner, that is a ground for winding up."

T. R. Venkatarama Sastri and *V. Visvanatha Sastri* for appellant.

Ch. Raghava Rao, T. V. Ramanathan and *K. R. Srinivasaraghava Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This is an appeal from a judgment of Stone, J., ordering the winding-up of the appellant

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1 (1909) 99 L. T. 581. 2. (1866) 3 Eq. 355 at 358.
3. (1897) 1 Ch. 57.

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company. The learned trial Judge has found that the company was formed for an illegal purpose, the purpose being an offence under S. 294-A of the Indian Penal Code, that is to say, conducting a lottery or keeping an office for the purpose of drawing a lottery or publishing proposals relating to the drawing in such lottery. No exception can be taken to the Memorandum of Association of the company where the objects of the company are quite unobjectionable. Had the affairs of the appellant company been conducted strictly in accordance with those objects, no complaint whatever could have been made against it. It is argued on behalf of the respondents that the Articles of Association disclose purposes far beyond those appearing in the Memorandum of Association. It is contended that the Articles disclose that the object of the company was to conduct a lottery. The appellants, on the other hand, contend that the object of the company was to benefit charity and that there was nothing illegal in the conduct of the company. Reference must be made at this stage to the Memorandum of Association. There we find that, amongst other objects, one object is to raise general donation funds to carry out charitable objects. Of the special donation fund raised, not less than 30 per cent. is to be invested entirely and permanently in Government securities and not more than 70 per cent. on the security of immoveable property. Of the interest from the before mentioned investments, not less than 75 per cent. is to be utilised in granting personal loans to the donors and in paying relief bonuses to their heirs. At the extraordinary general meetings of the company held on the 25th November and the 17th December, 1930, in lieu of certain existing Articles certain new Articles were incorporated after sanction by the shareholders. The important Articles are Articles 16, 17, 18, 19, 20 and 21. Under these articles a donation certificate is to be granted to a person for each sum of Rs. 100 he pays either in a lump payment or by instalments as a contribution to the Poor Houses Special Donation Fund of the Association; and one lakh of such certificates is to form one series. Out of the interest accruing on the 70 per cent. of the fund invested on security of immoveable property, not less than 75 per cent. is to be utilised every year in granting loans ranging from Rs. 1,000 to Rs. 10,000 to 200 donation certificate-holders on their personal security without interest and relief bonuses to the heirs of 200 donation

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certificate-holders who die before getting the loan of Rs. 1,000 or more for every complete series. The names of the donors that are to get such loans are to be determined only by means of drawings. A donation certificate is to cease to exist when once it is drawn; or, if an advance of Rs. 500 is made to any heir of a donation certificate-holder, all rights to claim any benefits in respect of the same certificate are extinguished. The scheme is one under which anybody who takes a donation certificate of Rs. 100 becomes entitled to a loan of Rs. 1,000 free of interest and any one who takes certificates for Rs. 1,000 becomes entitled to a loan of Rs. 10,000 free of interest if he is lucky enough to get his certificate drawn in any of the annual drawings. A person can take a certificate in each and all of the series. But only 200 donation certificates are to be drawn each year. Similarly Rs. 500 is to be paid to the heirs of a deceased donation certificate-holder but there are only to be 200 of such payments in each year; and the heirs of those deceased donation certificate-holders who have got loans are not to be paid the relief bonus. Subsequently, the Articles were still further altered and, in lieu of interest-free loans, cash bonuses were substituted. Instead of a donation certificate-holder getting loans of from Rs. 1,000 to Rs. 10,000 according to the number of certificates held, he was to get a cash bonus ranging from Rs. 500 to Rs. 5,000, that is to say, a half of the loan amounts.

The question to be considered is whether this scheme is a lottery or not. A lottery is not defined in the Indian Penal Code and we must, therefore, look elsewhere for a definition. One definition of lottery is found in Webster's Dictionary, viz., a distribution of prizes by lot or chance. In the present case is there anything which is determined by lot or chance? It is contended by the respondents that there is in the case of the loans because the loan is dependent upon whether a certificate is drawn or not and the benefit is therefore dependent upon chance. It clearly is dependent upon chance. Here the drawing is the chance and it cannot seriously be contended that the certificate-holder is dependent for his benefit upon anything else than chance. Suppose a certificate-holder has only one certificate. If he is lucky he may get his benefit during the first year itself; if he is not lucky, he may not get it, we are told, for at least sixty years. He may hold 12 certificates in which case he has

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12 chances in every yearly drawing and under the cash-bonus scheme he may be entitled to a cash bonus from Rs. 6,000 to 1,20,000 if all of them are drawn. The question is whether this necessarily leads to the conclusion that the scheme is a lottery and, in considering the question, English decisions upon the point may be more usefully considered since there is no definition of a lottery in the Indian Penal Code. One of these is *Sykes* v. *Beadon*[4]. In that case there was a Government securities trust or combination of more than twenty persons formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with a bonus. In the opinion of Jessel, M.R., this was a lottery and therefore illegal under the Lottery Act. On p. 190 Jessel, M.R., says:

"The holders of certificates are persons who subscribe money to be invested in funds which are to be divided amongst them by lot, and divided unequally. That is, the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose certificates are not drawn, and it depends upon chance which gets the greater or the lesser advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund between them by chance and unequally."

Another case is *Taylor* v. *Smetten*[5]. In that case Taylor sold packets each containing a lb. of tea at *2s. 6d.* a packet. In each packet was a coupon entitling the purchaser to a prize and the prizes varied in character and value. It was held that this constituted a lottery. It was conceded that the tea was worth the money paid for it but what the purchaser did was he bought the tea coupled with the chance of getting something of value by way of a prize but without the least idea what that prize might be. In making his purchase he exercised no choice. What he bought he bought without any option or action of his own will but as the result of mere chance or accident. Another case is the Premium Bonds case, Re *International Securities Corporation, Limited*[1]. It is a case very similar to this. The learned trial Judge in the course of his judgment refers to an Australian case. According to the headnote,—there is unfortunately no report available in Madras—the facts were very similar to those in the present case. The headnote is set

1. (1909) 99 L.T. 581.
4. (1879) 11 Ch. D. 170.
5. (1883) 11 Q.B.D. 207.

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out in the judgment of the trial court and it is therefore not necessary to repeat it here.* In that case on the facts it was held that that was a distribution of prizes by lot or chance and therefore a lottery. It was argued that there was no difference between a lottery and a wager. This argument was necessary because the appellants at first relied very strongly upon the decision of a Full Bench of this Court of which I was a member, viz., *Narayana Aiyangar* v. *Vellachami Ambalam*6, a chit fund case. It was there held that the promotion of a chit fund, wherein the number of subscribers is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time, is not a wagering contract within S. 30 of the Indian Contract Act even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. The headnote also states that this was not an offence within S. 294-A of the Indian Penal Code and it is this no doubt that has caused this case to be thought to support the appellants. The facts are set out at page 697 as follows:—

"In this case the defendants were the promoters of the chit fund in question. According to the rules framed by them for the fund they proposed to work the chit as soon as 500 people became subscribers, each agreeing to subscribe one rupee a month. The rules further provided that the chit was to run for 50 months and at the end of each month Rs. 50 was to be given by the defendants to the person who was determined by the casting of lots out of the 500. Any person whose name was so drawn by lot either in the first month or in any of the succeeding 49 months got Rs. 50 and he was thenceforward relieved from paying the further monthly instalments. After the 50th lot was cast the chit fund was to be closed and all the remaining 450 people were to be given by the defendants each Rs. 50. Under such rules the plaintiffs

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*The case referred to is *Mutual Loan Agency, Ltd.* v. *Attorney-General*, (1909) 9 C. L. R. 73. The headnote which is set out in E. & E. D., v. 25, p. 453 and reproduced in the judgment of Stone, J., runs as follows:—

"A limited company with power to raise a small capital conducted drawings for what were called 'ballot loans'. The funds to be applied towards loans were raised by subscriptions from the general public and each subscriber obtained a 'share warrant,' which conferred no interest in the company but entitled the holder to participate in the ballots. The ballots were drawn in the ordinary way and the drawers of the winning number won the right to loans of sums varying from £5 to £1000 without interest for 50 years subject to a deduction of 10 per cent. for expenses and if no security was given for the repayment of the loans, to a further deduction of 20 per cent. This latter sum was allowed to accumulate in the hands of the company or invested to provide a fund for the repayment of the subscriptions during the 50 years to subscribers who presented their share warrant:—*Held*, this was a distribution of prizes by lot or chance and therefore a lottery."—S. R.

6. (1927) I.L.R. 50 M. 696: 52 M.L.J. 687 (F.B).

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who subscribed for two chits subscribed Rs. 36 for 18 months at the rate of Rs. 2 a month. As the defendants refused to run the chit fund after the 18th month the plaintiffs brought this suit for Rs. 36 and interest. The defendants pleaded that the chit fund was a lottery, that the transaction between the parties amounted to a wagering contract and that it was therefore unenforceable. Upholding the defendants' plea, the Munsif dismissed the suit. Hence this revision petition."

In his Order of Reference to the Full Bench, Waller, J., stated that the two questions which arose were (1) whether the fund was a lottery, and (2) if it was whether the subscriptions were recoverable. When the case came before the Full Bench, as it was then constituted, a finding was called for as to whether an offence as defined by S. 294-A of the Indian Penal Code was committed when the transaction was formed. The District Munsif found as follows:—

"The plea was raised by the defendants. The onus is on them. Nothing is placed before me by them wherefrom I could determine how the chit fund was organised and advertised and whether any one who liked could join by merely paying subscriptions, points considered to be essential for a satisfactory solution of the question whether the chit fund was a lottery. As observed in the order of remand, the rules of the fund as given in the printed book filed with plaint are not sufficient to make this clear. In spite of facilities having been afforded to defendants, they have not chosen to appear before me and let in evidence though I waited till this day. I must therefore answer the question in the negative."

When the case was further considered, as there was the finding that no offence under S. 294-A, Indian Penal Code, had been committed, we proceeded to consider the only other point, viz., whether this amounted to a wagering contract. Throughout the judgment of the Full Bench there is a discussion of that aspect of the case and that only. It is quite clear that there was no decision by the Full Bench that the chit fund in question was not a lottery. Thus it was that at a late stage in the argument when the real effect of the Full Bench decision became apparent it was contended on behalf of the appellants that wagering was the same thing as keeping a lottery. In my view, the two are not the same. In *Carlill* v. *Carbolic Smoke Ball Company*[7] Hawkins, J., defines a wager thus:

"A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties . . . . If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

7. (1892) 2 Q. B. 484 at 490.

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In *Hampden* v. *Walsh*[8] a wager was described as a contract by *A* to pay money to *B* on the happening of a given event in consideration of *B* paying money to him on the event not happening. In *Thacker* v. *Hardy*[9] Cotton, L. J., says:

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way *A* will lose, but if it turns out the other way he will win."

In *Earl of Ellesmere* v. *Wallace*[10] Russell, J., held that there cannot be more than two parties or two sides to a bet and that there may be a multipartite agreement to contribute to a sweepstakes, which may be illegal as a lottery, if the winner is determined by chance, but not if the winner is determined by skill. In the present case none of the parties are betting against each other. There are no two sides unless the subscribers on the one hand and the company on the other can be said to be sides. The scheme under consideration seems to me to have none of the elements of a wager but to possess all of those of a lottery as defined. It was also argued for the appellants that it was essential to a lottery that there should be a money prize. This is clearly not necessary as the case of *Taylor* v. *Smetten*[5] shows. Nor can it affect the question that the subscriber receives the whole of the amount subscribed by him back again on some future date. What constitutes a lottery is that some gain is to come to the subscriber dependent upon pure chance, any element of skill being absent. In my view, the learned trial Judge was right in holding that the conduct of the appellant company was illegal under S. 294-A of the Indian Penal Code. It was further contended that, as the company was formed for the purpose of benefiting charities and the lottery was merely an *annexe* to the original business, no offence can be held to have been committed. This, in my view, is clearly wrong. S. 294-A of the Indian Penal Code is sufficiently wide in its terms to negative any such contention as this, and, moreover, there is an English case which shows the contrary, namely, *Leng (Sir W. C.) & Co. ("Sheffield Telegraph")* v. *Sillitoe*[11], the Football Coupon case. There a newspaper company was convicted of carrying on a ready money football betting business contrary to the Ready Money Football Betting Act of 1920. It

5. (1883) 11 Q. B. D. 207. 8. (1876) 1 Q. B D. 189 at 192.
9. (1878) 4 Q. B. D. 685. 10. (1929) 2 Ch. D. 1.
11. (1929) 1 K. B. 366.

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was found as a fact by the Justices that on the date specified in the charge some persons bought the newspaper solely, and that other persons bought it partly, to obtain the coupon and so to acquire the chance or possibility of winning a prize. Lord Hewart, C. J., says at page 373:

"What is necessary for a conviction under the Act is that the defendant should be shown to be carrying on a ready money football betting business within the definition in S. 2 of the Act. In my opinion, it is quite immaterial that a person who is charged with carrying on such a business can show that he is also carrying on another business, however well established and well known it may be. If he annexes to an existing business a business which comes within the statute he is liable to the penalties provided by S. 1. And, to appreciate the relation between the printer or publisher and his clients, it is not necessary to make a guess or to strike an average. What has to be examined is the nature of the transaction which takes place between the printer or publisher and the individual purchaser of the thing published."

In the present case from the handbook published by the Company it is quite clear that the public are invited to purchase the certificates because of the chance there is of securing valuable prizes. Although some of the objects of the Company may be philanthropic, it seems clear that the main object of the Company was to conduct a lottery. No argument upon the facts that the illegal business was merely annexed to the real business can prevail, nor could it, even if those facts were proved, in law prevail. It is further contended that no order for the compulsory winding up of the Company ought to be made because it is still possible for the Company to conduct itself so as only to carry out the original purposes for which it was formed and that the objectionable features of it can be removed. It seems to me, however, that by the removal of its obnoxious features the substratum of the Company goes. Under these circumstances, the learned trial Judge was quite right in ordering it to be compulsorily wound up. This appeal must, therefore, be dismissed with costs.

Cornish, J.

Cornish, J.—I am of the same opinion. I think it is impossible to regard the scheme of interest-free loans or cash-bonus scheme which supplanted it as anything but a lottery. According to the scheme as adumbrated in the Articles of Association and in the prospectus issued by the Company a donation of Rs. 100 to a fund called the Poor Houses Special Donation Fund gives the donor a certificate and the chance of that certificate winning one of the 200 prizes ranging in amount from Rs. 500 to Rs. 10,000 at the annual drawing of certificates for these cash bonuses. The Articles and the prospectus

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expressly provide that the prize-winners, as also the amount of the prize won by each, shall be determined only by means of drawings. The scheme purports to ensure a certificate-holder receiving at least Rs. 500 in respect of his certificate for the arrangement is that if the certificate is not drawn for a prize in the holder's lifetime his heirs will receive on his death a payment of Rs. 500, called a Death Relief Bonus. But the winning of the other cash bonuses is purely a matter of chance dependent on the luck of the draw. And this feature, in my judgment, entirely distinguishes the case from *Wallingford* v. *Mutual Society*[12] where the fact that the apportionment of the loans to members of a benefit society was regulated by lot was held not to bring the arrangement within the Lottery Acts. The lot merely decided the order in which the loans were to be made to the members of the society, and the loans were not in the nature of prizes dependent on the chance of the draw.

There is no definition of "lottery" in the Indian Penal Code; so that the word, as it occurs in S. 294-A, Indian Penal Code, must bear its ordinary meaning, which is, a distribution of prizes by lot or chance without the use of skill: see Re *International Securities Corporation, Ltd.*[1] and *Earl of Ellesmere* v. *Wallace*[10]. An absolutely gratuitous distribution of chances, none of which had been paid for by the participants would not, in the opinion of Darling, J., in *Willie* v. *Young and Stembridge*[13], amount to a lottery. But that is not the case here. It is true that the prize money was provided from the interest received from investments made by the Company of the money subscribed by the certificate holders. But the money was subscribed with the knowledge and with the object that it was to be invested and that a specified proportion of the interest derived from the investments was to be distributed amongst the subscribers in cash prizes according to the luck of the draw. That was the great inducement held out in the Company's prospectus to subscribe and become a certificate holder. The prospectus, at p. 34, in describing the advantages of taking certificates, says:

"The maximum amount of cash bonus one can get in respect of each certificate in the drawings is Rs. 10,000. That is to say, if a person holds two certificates in each of the twelve series, he will be entitled to a cash bonus up to Rs. 2,40,000 at Rs. 10,000 for each certificate in case all of them come up first in the drawings."

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1. (1909) 99 L. T. 581.
10. (1929) 2 Ch. D. 1 at 52.
12. (1880) 5 A. C. 685.
13. (1907) 1 K. B. 448.

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In fact, the subscribers embarked their money in the Company for the purpose of participating in chances of drawing these big money prizes. In my judgment the cash bonus scheme was clearly a lottery.

The learned advocate for the appellant laid great stress on the Full Bench ruling in *Narayana Aiyangar* v. *Vellachami Ambalam*[6] in aid of his contention that there was no substantial difference between a chit fund scheme and the present scheme. The Full Bench, however, did not rule that a chit fund was not a lottery. There was no occasion for it so to decide in view of the finding, called for from the Lower Court, that the necessary elements of an offence under S. 294-A, Indian Penal Code, were absent. The decision was confined to the question whether the subscribers to the chit fund could enforce the contract against the promoter; and it was held that they could, because the contract was not a wagering, and consequently a void, contract. But a lottery does not mean the same thing as a wagering contract, and Ramesam, J., who delivered the judgment of the Full Bench, was careful to point this out in criticising the use of the word "lottery" by Spencer, J., in *Veeranan Ambalam* v. *Ayyachi Ambalam*,[14] to signify a wagering contract. The distinction between the two will be found further illustrated in *Stoddart* v. *Sagar*[15] and in Russell, L.J.'s judgment in *Earl of Ellesmere* v. *Wallace*[10].

It remains to be considered what should be done with the Company. It is clear from the Articles and the prospectus that the Company is conducting this lottery as an important integral part of its business. According to the prospectus the sum to be annually expendible in providing cash bonuses does not fall far short of the amount to be allocated to the charitable undertakings of the company. But a lottery *per se* is not illegal in British India. An Act, V of 1844, entitled an Act for suppressing all lotteries not authorised by Government, declared unauthorised lotteries to be common nuisances. But it was repealed by Act XXVII of 1870 which amended the Indian Penal Code by introducing S. 294-A. The illegal aspects of a lottery, therefore, have to be found in S. 294-A, and consist in the keeping of any office or place for the purpose of

6. (1927) I. L. R. 50 M. 696: 52 M. L. J. 687 (F. B.).
10. (1929) 2 Ch. D. 1.
14. (1925) 49 M. L. J. 791.
15. (1895) 2 Q.B. 474.

drawing any lottery not authorised by Government or in publishing such lottery. There can, I think, be no doubt that the Company in keeping an office, as it does, for the conduct of this lottery, and in publishing in its Articles and prospectus the scheme of the lottery, is acting in contravention of S. 294-A. The business—at least a very substantial part of it—which it is carrying on is consequently an illegal business; and, such being the position, the case of Re *International Securities Corporation, Ltd.*[1] is good authority for ordering the compulsory winding up of the company.

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S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE BURN.

Adam Hajee Peer Mahommed Essack .. *Appellant** (*Plff.*)

v.

Hajee Sukur Ganny .. *Respondent* (*Deft.*).

Tariff Act (VIII of 1894), S. 10—Increase of duty between date of contract and date of delivery—Liability to pay increased duty—Right of seller to refuse delivery without having himself paid the duty.

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Section 10 of the Tariff Act refers to the sale of an article duty free. It is intended to make it plain, in the absence of any agreement, upon whom rests the liability to pay duty on articles agreed to be sold, where the duty has increased between the date of contract and the date of delivery. In such a case, the seller is entitled to refuse to give delivery until the agreed purchase price plus the increased duty is tendered to him, even though he has not already paid the increased duty himself.

On appeal from the judgment of the Honourable Mr. Justice Stone, dated 31st July, 1931, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 120 of 1930.

G. Ramakrishna Aiyar and *C. Srinivasachari* for appellant.

T. N. Sambasivan for respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This appeal raises an interesting point. The appellant was the plaintiff in the trial Court

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*O.S.A. No. 83 of 1931. 29th July, 1932.

1. (1909) 99 L. T. 581.

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and in the suit he claimed damages from the defendant for non-delivery of some bags of sugar. The defendant, the respondent here, was the seller of those bags which had been imported from Java and at the time of the sale lay in a bonded warehouse. The sale was effected on the 28th February, 1930 and on the next day the import duty on sugar was increased by Rs. 3 per bag. On that day the plaintiff demanded delivery of the sugar from the defendant and delivery was refused because the Customs House authorities refused to allow delivery to be given unless the increased duty in respect of the bags was paid. The sale was a sale of ready goods for ready delivery. Stone, J., has found as a fact that the sale was of goods in a bonded warehouse and there is ample evidence to support that finding—indeed, there is no evidence on the appellant's side to the contrary. Evidence was necessary upon the point because it was argued that a sale of goods of this description meant a sale of goods in a warehouse which was not a bonded warehouse, not requiring the payment of any extra customs duty. It should be mentioned that the appellant possesses another warehouse in Madras but the limit of its accommodation is 1000 bags of sugar and that the suit claiming damages was in respect of bags which lay in the bonded warehouse. I see no reason whatever to find fault with the findings of fact of the learned trial Judge on this point.

What we have now got to consider is whether the appellant was entitled to demand delivery of the bags of sugar without paying the increased duty. It is argued that by reason of S. 10 of the Indian Tariff Act, 1894, the liability to pay the increased duty does not fall upon the appellant at all but upon the respondent, because the respondent has not brought himself within the provisions of that section. That section obviously was enacted for the purpose of making it plain, in the absence of any agreement, upon whom the liability to pay duty upon articles which had been agreed to be sold was, where the duty had increased between the time the contract of sale was made and the delivery of the goods. It was in order to make quite clear what the position both of the seller and the purchaser of the goods would be under such circumstances. Here, in between the time of entering into the contract of sale of these bags of sugar and their delivery the import duty was increased by Rs. 3 per bag. Upon whom was the liability to pay that increase? The section in question, S. 10, reads as follows:—

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"In the event of any duty of customs or excise on any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such *article duty-paid* where duty was chargeable at that time.............".

It is the latter part of the section which has application here. This was a case of the sale of an article in respect of which there was a duty chargeable and that duty chargeable was subsequently increased. Here sub-clause (*a*) to S. 10 comes into play. It is as follows:—

"If such imposition or increase so takes effect that the duty or increased duty, as the case may be, (or any part thereof) is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition."

Sub-clause (*b*) has no application here. The point taken before us, although it does not appear to have been taken at all before the learned trial Judge, was that the words "article duty-paid" in the section mean articles upon which the duty has been paid at the time of the making of the contract. In my view, that is not the meaning of those words. What, in my view, is meant is that it is to be a sale of an article in respect of which the liability to pay duty is upon the seller and he sells the article duty free. If it had been intended that in order to comply with the provisions of that section or to bring himself within the provisions of that section a seller must already have paid the duty, then I should expect the section to read "for the sale of such article upon which the duty has been paid". That is not what the section says. Stone, J., says that it was the duty of the purchaser who is under that section liable to pay the increased duty to tender the proper amount to the seller before he was entitled to demand delivery. That, of course, is one alternative. It is also pointed out by the learned trial Judge that the seller himself might have paid the duty and recovered the increase from the purchaser; but this is a suit by the appellant to recover damages for non-delivery of the goods and, in my view, the respondent was perfectly entitled to refuse to give delivery until the proper price, that is to say, the agreed purchase price *plus* the increased duty had been tendered to him. The fact that the duty had not been paid in this case makes no difference at all. It is found as a fact that the sale was of goods in a bonded warehouse and by reason of S. 37 of the Sea Customs Act it does not matter at all whether the old duty

Adam Hajee Peer Mahommed Essack v. Hajee Sukur Ganny.

Beasley, C.J.

had been paid. Under that section if the old duty had been paid and the goods had been allowed to remain in the bonded warehouse and subsequent to the payment of the old duty a new duty, the increased duty, had been put upon the goods, then that duty would have to be paid if and when goods were removed from the warehouse if the purpose for which the goods was removed was home consumption; and that is this case. So that it did not make any difference at all whether the old duty had been paid or not. The new duty would still have to be paid under S. 37 of the Sea Customs Act the goods not having been removed from the warehouse before the date of its imposition. It being found that this was a sale of goods in a bonded warehouse, the question as to whether or not old duty has been paid is immaterial. In my view, S. 10 of the Indian Tariff Act means a sale of goods duty-free. For these reasons, this appeal must be dismissed with costs.

Burn, J.

Burn, J.—I agree with my Lord the Chief Justice.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE CORNISH.

P. Venkatachalam, a business concern in condiments, by Mr. C. Pattabhirama Aiyangar, one of the Joint Receivers of the said business and another .. *Appellants** (*Plffs.*)

v.

Rajagopal Naidu and another .. *Respondents* (*Defts.*).

Venkatachalam v. Rajagopal Naidu.

Trade Mark—Passing off action—Descriptive name acquiring secondary meaning—Proof—" Madras Curry Powder "—Exclusive right to use of name—Acts complained of committed outside jurisdiction—Remedy by way of injunction.

The plaintiffs, who were the receivers of a condiment business, sued for an injunction restraining the defendants from selling goods known as "Madras Curry Powder" in packages designed and labelled so as to resemble those of the plaintiffs. The acts complained of were committed in England. The evidence, however, was found insufficient to show that in England "Madras Curry Powder" had come to be understood as curry powder exclusively manufactured by the plaintiffs.

Held, that the suit must fail on the merits. The question whether a name originally descriptive, such as " Madras Curry Powder," has obtained

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*O. S. Appeal No. 8 of 1931. 2nd March, 1932.

Venkatachalam *v.* Rajagopal Naidu.

a secondary meaning in connection with a particular manufacture should be decided on the facts of each case.

Reddaway v. *Banham*, L. R. (1896) A. C. 199, *S. Chivers & Sons* v. *S. Chivers & Co., Ltd.*, (1900) 17 R. P. C. 420, *Cellular Clothing Co., Ltd.* v. *Maxton and Murray*, L. R (1899) A. C. 326, and *Havana Cigar Tobacco Factories, Ltd.* v. *Oddenino*, L. R. (1924) 1 Ch. 179, considered.

Held, further, that while the Court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction, it will not do so unless that remedy is likely to be an effective one. Question whether the remedy prayed for was likely to be effective not decided in the particular case.

On appeal from the judgment of the Honourable Mr. Justice Waller, dated the 2nd day of December, 1930, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 65 of 1929.

S. Ramanujachari for *V. V. Srinivasa Aiyangar* and *B. Ananda Bai* for appellants.

K. Krishnaswami Aiyangar and *G. A. Pais* for respondents.

The Court delivered the following

Beasley, C.J

JUDGMENTS. *The Chief Justice.*—The suit under appeal was brought by the receivers of P. Venkatachalam's condiment business to restrain the defendants from selling the curry powder manufactured by them called the "Madras Curry Powder" in packages designed and labelled so as to resemble those of the plaintiffs. The 2nd defendant in the suit is the minor son of the late P. S. Loganatham, a grandson of the original P. Venkatachalam, who died about a year ago. It is conceded that the defendants did not sell or offer for sale any of their curry powder in Madras. The acts complained of were committed in England where, it must be observed, there is an action pending against a firm called Colinson & Co. claiming the same reliefs as here and for the same alleged reasons. Waller, J., did not decide the case on the merits but held on the admitted facts that he had no jurisdiction to try the suit. That point was not raised in the written statement nor was there any issue taken upon it. Waller, J., found that the passing off complained of, if done, was not done by the defendants in Madras but by their agents in England and that the passing off, the passers off and the evidence were all in England. He accordingly dismissed the suit with costs. From his judgment it seems that he has found that the passers off in England were the agents of the defendants and also that the defendants did

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Beasley, C.J.

not give their agents any authority to sell the curry powder got up in the manner complained of by the plaintiffs.

I do not propose to say anything with regard to the question of jurisdiction or the findings with regard to the agency or the want of authority in the agents because it seems to me quite clear that this case must fail upon another point. It is sufficient to say with regard to jurisdiction that, whilst it is true that a Court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction, it will not do so unless that remedy is likely to be an effective one. In this case it is argued by the respondents that, as the defendants have no property here, the remedy could not be an effective one. Upon this point it is not necessary to give an opinion. In my view, the appellants' case fails because the evidence falls far short of proving that they had in England the exclusive right to sell the "Madras Curry Powder". It may well be that the "Madras Curry Powder" manufactured by them had obtained considerable reputation in England. But it does not follow, therefore, that other manufacturers of Madras curry powder had not obtained for themselves a similar reputation. What is claimed by the appellants is that they have acquired a right to the exclusive use of the name "Madras Curry Powder" with regard to the goods manufactured in their business. That is what is claimed in the plaint and that is the first issue framed; and that the appellants must succeed in proving before the question of the passing off can be considered. It was strenuously contended on behalf of the appellants that all the Court had to consider was the question of the alleged passing off. That is not so because the first issue must, first of all, be found in favour of the plaintiffs. In *S. Chivers & Sons* v. *S. Chivers & Co., Ltd.*[1] Farwell, J., as he then was, stated that there were two questions which had to be answered, viz., whether the plaintiffs had established that "Chivers' Jellies" or "Chivers' Table Jellies" had acquired a secondary meaning and had come to mean jellies made by the plaintiffs and whether the defendants had so described their jellies as to be likely to mislead the purchaser into believing that the jellies were the jellies of the plaintiffs. These questions Farwell, J., took from the questions left to the jury by

1. (1900) 17 R. P. C. 420.

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Collins, L.J., in *Reddaway* v. *Banham*.[2] The plaintiffs in that case sought to restrain the defendants from selling Chivers' Table Jellies, a description under which the plaintiffs sold jellies manufactured by themselves. The plaintiffs' suit failed. Farwell, J., in discussing the evidence refers particularly to the evidence of two witnesses. One of them said :

"If a customer asked me for Chivers' jellies I should sell what I had in stock; if I had both I should ask him which he required."

The other witness said :

"If asked for Chivers' jellies I should give the defendants' ; if I had both, I should ask which was wanted."

I refer to this evidence because of the answers given by the plaintiffs' first witness in this case whose evidence I will deal with later on. On the authority of this case, it is necessary for the appellants to prove that the Madras curry powder which is merely descriptive of the kind of powder and the place of its manufacture has acquired a secondary meaning and has come to mean curry powder manufactured by themselves and not by other manufacturers. Another case upon this point is *Havana Cigar Tobacco Factories, Ltd.* v. *Oddenino*[3]. For many years the brand name "La Corona" or "Corona" had been used by the plaintiffs and their predecessors. It was not disputed that when used as a brand those words indicated cigars of the plaintiffs' manufacture. Many years before, the plaintiffs introduced a new size name "Coronas". Cigars of the Corona brand and Coronas, or Corona size were known as "La Corona Coronas" or "Corona Coronas". This size name was adopted by other manufacturers and had for many years been used as a size name. The defendant in complying with a request for "some Cigars—Coronas" supplied cigars of the Partagas brand and Coronas size. The defendant claimed the right in response to a request for a "Corona Cigar" or any similar request so phrased as not to indicate whether the word "Corona" was used to refer to brand or to size, to supply a cigar of any brand provided it was of the Corona size. In an action brought by the plaintiffs claiming an injunction to restrain the defendant from selling, or supplying, or offering or exposing for sale, or passing off, or inducing or enabling others to pass off, cigars not of the plaintiffs' manufacture as or for the plaintiffs' "La Corona" brand of cigars by the use of any

2. (1896) A.C. 199: 13 R. P. C. 218. 3. (1924) 1 Ch. 179.

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words consisting of or containing the word "Corona" as a brand name, and from selling or supplying, in response to orders for "Corona" cigars, cigars not of the plaintiffs' manufacture, it was held that the words "a Corona cigar" being on the evidence proved to be ambiguous in meaning, the defendant, if he exercised the right which he claimed, would, in the majority of cases of a request for "a Corona cigar," be passing off goods not manufactured by the plaintiffs as goods of their manufacture. It was argued on behalf of the defendant in the action, who was the appellant in the Court of Appeal, that the respondents, the plaintiffs, had to prove that the word "Corona" in the trade denoted exclusively goods of their manufacture. At page 195 Warrington, L.J., says:

> "As to the authorities I have little to say, for, as I have already stated, they are not directly in point. In *Reddaway* v *Banham*[2] and in *Cellular Clothing Co.* v. *Maxton and Murray*[4] the question was whether a name originally descriptive had obtained a secondary meaning as denoting exclusively the plaintiffs' goods This question does not arise in the present case, for it is not disputed that the word 'Corona' used as a brand name denotes exclusively the plaintiffs' goods."

In *Wotherspoon* v. *Currie*[5] Lord Westbury says:

> "I take it to be clear from the evidence that, long antecedently to the operations of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants."

In *Powell* v. *The Birmingham Vinegar Brewery Co.*[6] the plaintiffs had manufactured for years and sold under the name of "Yorkshire Relish" a sauce made according to a secret recipe. The term "Yorkshire Relish" had come to mean that particular manufacture. I quote this case merely in order to show that that element had to be present. *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*,[7] *Massam* v. *Thorley's Cattle Food Company*[8] and *Reddaway* v. *Banham*[2] may also be referred to. In the latter case belting made of camel hair yarn had been known in the markets of the world for many years. It had been sold under a variety of names. But there was ample evidence to justify the finding that amongst those who were the purchasers of such goods the words "camel hair" were not applied to belting made of that

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2. (1896) A. C. 199.
4. (1899) A. C. 326: 15 R.P C. 581.
5. (1872) L. R. 5 H. L. 508 at 521.
6. (1896) 2 Ch. 54
7. (1899) A. C. 83.
8. (1880) 14 Ch. D. 748.

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material in general and that, in short, it did not mean in the market belting made of a particular material but belting made by a particular manufacturer. In *Cellular Clothing Co., Ltd.* v. *Maxton and Murray*[4] Lord Shand in the course of his judgment speaking of the Reddaway's case says as follows:—

"Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only—and, indeed, were it not for the decision in Reddaway's case, I should say this should be made altogether impossible."

Even in cases where the plaintiff is able to prove that in a certain locality his goods have been sold under a particular name and it could therefore be held that in that particular place by its universal use the word has acquired a secondary signification, Lord Shand in the before-mentioned case is of the opinion that that would not entitle the plaintiff to have an injunction in every part of the country. These cases are sufficient to show that in order to succeed in the suit the appellants must at least succeed on the first issue.

I will now proceed to examine the oral evidence in this case which is very brief. P. W. 1 is one of the joint receivers appointed by this Court of the condiment business of the late P. Venkatachalam. Whilst in England he purchased a number of packets of the "Madras Curry Powder," the object being of course to ascertain whether some other manufacturer or manufacturers were selling curry powder so described in England. At the time of making the purchases he asked for the "Madras Curry Powder" and from some dealers he obtained the appellants' curry powder and from others that manufactured by the respondents. He produced a number of such packages containing curry powder in Court. He first of all stated that of his own knowledge the curry powder manufactured by the appellants was known in England as Venk's powder or Venkat's powder or the "Madras Curry Powder" and that when the name of the "Madras Curry Powder" was mentioned it was understood to be the powder manufactured by the appellants. The criticism with regard to

4. (1899) A. C. 326: 15 R. P. C. 581.

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this evidence is that it is purely hearsay evidence. Neither is it the evidence of a person engaged in the trade, such as a retail dealer, nor can it be said that the witness is possessed of any expert knowledge about the matter. In his examination-in-chief, the following questions and answers appear:—

Q.—When you asked for Madras Curry Powder, what were you given?

A.—Either this or that.

Q.—Can you explain how it came about that when you asked for Madras Curry Powder they gave either?

A.—Probably because it carried the name of Madras Curry Powder or because it has some connection with Venkatachalam.

In cross-examination there are the following questions and answers:—

Q.—Likewise you went to retail shops and asked for one of this sort and one of the other sort?

A.—In the retail shops I asked for Madras Curry Powder. It is only from Selfidge that I asked that, so that the Court might know about it.

Q.—What did you ask for in retail shops?

A.—I simply asked for Madras Curry Powder. Then either this one or that one was offered.

Q.—They treated both alike as having had a reputation as Madras Curry Powder?

A.—I do not know whether they treated both as having the same reputation.

Q.—In response to your asking for the Madras Curry Powder the shopman gave you one of this and one of that and asked you to choose?

A.—They will give this or that.

Q.—And you bought both?

A.—In some places both and in some places only defendants' powder."

These answers seem to me to completely destroy the appellants' case. It seems to me that it is impossible for the appellants to claim that in England "Madras Curry Powder" has come to be understood as the curry powder exclusively manufactured by the appellants. The other witnesses really carry the case no further. There is no evidence here of any retail dealers to support the plaintiffs' case. No doubt it would be expensive and inconvenient to get such evidence, but if it existed, it could and should have been got. It may be that in the litigation in England the plaintiffs can get such evidence and prove that the "Madras Curry Powder" manufactured by them has come to be regarded in England as exclusively their manufacture. If the plaintiffs do that, then the Court will proceed to consider the question of passing off. On the evidence,

in my view, the appellants' case must fail. Therefore, on the merits, this appeal must be dismissed with costs. The Receivers may pay the costs and take their own costs out of the estate.

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Cornish, J.—I agree.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Raghunatha Desikachariar .. *Appellant* (Defendant)*

v.

Rangaswami Pillai .. *Respondent (Plaintiff).*

Raghunatha Desikachariar *v.* Rangaswami Pillai.

Madras Estates Land Act (I of 1908), Ss. 24, 52, 53 and 112—Rent enhanced by agreement—Sale of holding for—Puttah and muchilika exchanged—Right of ryot to question validity of distraint or sale.

Section 24 is absolute and peremptory. The landholder cannot, independently of the Act and without a suit under S. 30, enhance the rent by agreement with his tenant and it is open to the latter, in proceedings instituted by the landholder under S. 112, to contest the landlord's right of sale on the ground that a portion of the arrear claimed was rent so enhanced, though a puttah and muchilika had been exchanged between the parties.

Appeal against the decree of the District Court of South Arcot in Appeal Suit No. 243 of 1928 preferred against the decree of the Court of the Deputy Collector of Tindivanam Division in R. Suit No. 1 of 1927.

S. Varadachariar for *S. V. Venugopalachari* for appellant.

K. Rajah Aiyar for *K. Desikachari* for respondent.

The judgment of the Court was delivered by

Jackson, J.

Jackson, J.—Suit by a ryot contesting the right of the landholder to sell his holding under S. 112, Madras Act I of 1908, for arrears of rent.

It is not disputed that from 1919, or fasli 1329, the rent was enhanced by 2 annas in the rupee by mutual consent. Nor is it disputed that this enhancement was due to a rise in local prices and to repairs to the irrigation works. On the facts the landholder may or may not have had good grounds for a suit under S. 30 of the Act. But, could he, and this is the question, enhance the rent without a suit, and independently of the Act, by agreement with his tenant?

Section 24, marginally described as "Restriction on enhancement" runs "the rent of a ryot shall not be enhanced except

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*S. A. No. 1272 of 1930. 29th July, 1932.

Raghunatha Desikachariar v. Rangaswami Pillai.

Jackson, J.

as provided by this Act," and then S. 30 provides for a suit to that end by the landholder. So far as we can discover from the Reports it has never been argued before a Bench, much less held, that S. 24 was otherwise than absolute and peremptory. It leaves no room for enhancement otherwise than as provided for by the Act, as for instance, by private contract.

No doubt under S. 187 certain contracts made before or after the passing of the Act are invalidated, and a contract to enhance rent is not in this category. But there is no question of invalidating a contract to enhancement made before the passing of the Act, and therefore contracts limited to those made after the passing would not naturally fall into this dual category of contracts "made before or after".

We do not find that the omission of such contracts from S. 187 affects the plain language of S. 24, cf. *Venkataramanachar* v. *Ibrahim Sahib*[1]. Nor do we find anything in the Act to justify the further argument that a ryot who has once given a muchilika accepting a puttah containing an enhancement is any way debarred from contesting its legality. The language of S. 112 is very broad. On a landholder's attempting to sell a holding for an arrear of rent under S. 111, the ryot may file a suit "contesting the right of sale". This will allow him to raise all possible pleas, including the plea that a portion of the arrear claimed is an enhancement not as provided by the Act, and therefore an amount which cannot be claimed under the Act.

It is argued that this broad right of suit is narrowed by the terms of Ss. 52 and 53; but those sections only lay down the formal prerequisites for the process of distraint without in any way begging the question at issue between the parties. Before a landholder can distrain by summary process he and the ryot in question must be deemed to have exchanged puttah and muchilika, S. 53, and the circumstances in which, and the period for which, such exchange will be deemed to have occurred is explained in Ss. 52 and 53. But there is no warrant for reading into these sections that once there has been an exchange, then, for all purposes of distraint, the puttah shall be held to be valid. On the contrary as regards a puttah of previous faslis continuing in force (the present case) it is

1. (1924) 20 L. W. 582.

Raghunatha Desika-chariar *v.* Ranga-swami Pillai.

Jackson, J.

expressly laid down at the end of S. 53 (1) that it must be a valid puttah. As a mere matter of drafting the word "valid" might have been inserted before puttah wherever it occurs in this sub-section; or it might have been omitted altogether, with the natural presumption that the puttah whether exchanged, tendered or continued must be valid; but the sense of the section is perfectly clear. A distraining landholder must show a puttah (or prove its tender) as certifying his *prima facie* right to distrain; and the ryot may then go below the surface and question whether the puttah is so valid as to justify the distraint.

For these reasons we agree that the judgment of the learned District Judge is correct, and the appeal must fail.

The appellant did not attempt to argue in this appeal that another item of the arrear claimed, a charge for taking green manure from land not in the use or occupation of the ryot, is rent, and withdrew his claim to that amount; so we have not discussed the item.

The appeal is dismissed with costs.

S. R.   *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Narla Ramakrishnayya .. *Appellant** (*Respondent in S. A. No.* 1379 *of* 1926 *on the file of the High Court—Defendant*)

v.

Myneni Venkataranga Rao and another. *Respondents* (*Appellants Nos.* 2 *and* 3 *in do.—L. Rs. of* 1*st plaintiff*).

Rama-krishnayya *v.* Venkata-ranga Rao.

Madras Hereditary Village Offices Act (*III of* 1895), *Ss.* 6 (1), 21 *and* 23—*Abolished offices—Preservation of rights in families of last holders—Duty of Collector—Suit to enforce rights preserved—Maintainability in Civil Court.*

Section 6 (1) of the Madras Hereditary Village Offices Act, 1895, preserves certain legal rights in the families of the last holders of the abolished offices, the provision that "the Collector shall select from among the families of the last holders" being mandatory and not merely directory. Where such rights are infringed, the persons [illegible] whom they are preserved can

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* L. P. A. No. 14 of 1930.   17th March, 1932.

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maintain a suit in the Civil Court for their vindication by means of a declaratory decree.

Kanthavadivelu Mudaliar v. *Ramaswami Mudaliar*, (1927) 54 M. L. J. 357, dissented from.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Kumaraswami Sastriar, dated the 19th December, 1929 and passed in Second Appeal No. 1379 of 1926 preferred against the decree of the Court of the Subordinate Judge of Bapatla in A. S. No. 266 of 1925 preferred against the decree of the Court of the District Munsif of Repalli at Tenali in O. S. No. 307 of 1923.

G. Lakshmanna for appellant.

S. Varadachariar and *V. Pattabhirama Sastri* for respondents.

The Court delivered the following

Ananta-krishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—This is an appeal against the judgment of Mr. Justice Kumaraswami Sastriar in S.A. No. 1379 of 1926. The original suit which gave rise to this second appeal was instituted by two members of the Myneni family for a declaration that the last holder of the office of the Village Munsif of Dhulipudy was Myneni Bhishiah *alias* Nagabhushanam, that the plaintiffs are the only surviving members of the last male-holder's family from whom on revision a selection should be made of the person best qualified for the office and that the appointment of the defendant (a member of the Narla family) as the permanent Village Munsif of Dhulipudy is illegal, and for some other reliefs. Both the District Munsif and the Subordinate Judge held that the Civil Courts have jurisdiction to try this suit, and the learned Judge of this Court was also of the same opinion. The first point raised by Mr. G. Lakshmanna, the learned advocate for the appellant, is that the Civil Courts have no jurisdiction in the matter. To appreciate the arguments advanced by the learned advocate for the appellant, it is necessary to state a few more facts. The village establishments in Guntur District were revised once in 1900 and again in 1912. The revenue village of Dhulipudy was split into two revenue villages in 1900—Dhulipudy and Karankipalem. In 1912, those two villages were split up into three revenue villages of Dhulipudy, Karankipalem and Addankipalem. As observed by the Collector in disposing of an appeal filed before him by the present plaintiffs in a suit

Rama-krishnayya v. Venkata-ranga Rao.

Ananta-krishna Aiyar, J.

instituted under Madras Act III of 1895 and also by the Lower Courts in the present suit, there were a number of changes in the appointments that were made at the time of these two revisions of the village establishments which led to a lot of confusion as seen from various orders which were passed by the Revenue Authorities which are not easily reconcilable. The final appointment to the village of Dhulipudy was of the defendant—a member of the Narla family. That led to the present suit.

It is convenient at this stage to refer to some of the relevant provisions of Madras Act III of 1895. Under S. 6 of the Act,

"the Board of Revenue may . . . divide any village into two or more villages, and, thereupon, all hereditary village offices in the villages or portions of villages or village . . . divided shall cease to exist and new offices, which shall also be hereditary, shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished."

Right of suit before Collector is given under S. 13 of the Act in respect of the offices for recovery of emoluments of such offices and for registry as heir; jurisdiction of the Civil Courts is barred under S. 21 in respect of certain matters. S. 23 deals with appeals against orders passed by the Collector under S. 6 of the Act and from decrees and orders passed under S. 13. S. 20 provides for the framing of rules not inconsistent with the Act in regard, among others, to the holding of inquiries under S. 6 and the hearing of appeals under S. 23.

The first question raised before us is whether a right of suit in the Civil Court is available to the plaintiffs for the reliefs mentioned already, claimed by them.

It is admitted that the office of the Village Munsif of the village of Dhulipudy was hereditary before 1900, and continued to be so at the time of the revisions in 1900 and 1912. The plaintiffs contend that the family of the last holder of the office is Myneni, and that under the last clause of S. 6 (1) of the Act, "in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished". For the purpose of this argument, we must assume that the family of the last holder of the office is Myneni and that the plaintiffs are properly qualified for the office, it being admitted that the defendant belongs to a

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Ananta-krishna Aiyar, J.

different family—Narla family. The scheme of the section seems to be that at the time of such revision and when a village is divided, the old hereditary village office should cease to exist, and new offices should be created for the new villages. It is specifically declared that in such cases, the new offices shall also be hereditary. The dispute turns on the exact meaning to be given to the last sentence in S. 6 (1). For the appellant it was argued that it only means that the Collector should also consider whether there are any persons in the family of the last holder of the office who has got the requisite qualifications but that the Collector's discretion in selecting the best candidate from among all the persons available, is not in any way hampered by the section. The contention was that the reference to the family of the last holder was only a sort of suggestion to the Collector in making the selection, and that it was in no sense a mandatory provision. I am unable to agree with this view. The office of the Village Munsif has been hereditary generally in the Presidency from very early times. That hereditary right is valued very much. The Legislature has in S. 6 recognised these facts. It is specifically provided that though the old hereditary village offices shall cease to exist in such cases, the new offices shall also be hereditary. It is in recognition of the important nature of these hereditary offices, and the great value attached to the same by the persons interested, that the Legislature has specifically stated that in choosing persons to fill such new offices, "the Collector shall select the persons whom he may consider the best qualified from the families of the last holders of the offices which have been abolished". The use of the word "shall" is very significant. In Craies on Statute Law, 3rd Edition, p. 204, it is stated as follows:—"It should be observed that the word 'shall' is now avoided in statutes except where it creates a duty". In my opinion the hereditary right is a legal right, and the same has been preserved by the Act; the present is therefore a case where in respect of an existing right some remedy has been provided for by the Act. Under S. 23, there is a right of appeal provided, from an order passed under S. 6; but that does not take away the right of recourse to Civil Courts when the legal right is infringed. It is a well-understood principle of law that when a statute does not for the first time create a right in favour of a person but only provides for a new mode

of enforcing the pre-existing legal right, then, in the absence of any clear indication in the statute to the contrary, the right of suit in the Civil Court to enforce the right is not taken away from him. The new remedy is taken to be an additional remedy. Here, the inquiry under S. 6 is admittedly of an administrative character, and the appeal from an order passed under S. 6 is also of the same character. In fact, the appellant asks us to construe the last sentence of S. 6 (1) as only a piece of administrative instruction to the Revenue Officers to whom power is given under S. 6 to pass orders relating to the matter. It is difficult to hold that by providing for such administrative orders, the Legislature intended to take away the right of suit to enforce the pre-existing hereditary right. In this connection, I may also mention that S. 6 is not the natural place where one would expect any administrative advice or instructions to be enacted; such advice and instructions would be more appropriate in respect of rules to be framed under S. 20 of the Act.

If the Act provided for a suit in Revenue Court under S. 13 of the Act in respect of such a matter, then, having regard to the provisions of S. 21, it might, at least plausibly, be contended that right of suit in the Civil Court has been taken away; but having regard to the scope of Ss. 13 and 21 (to be noticed later on), no suit is maintainable under S. 13 of the Act in circumstances like the present.

In my opinion, it is not from the mere fact that an obligation has been cast on the Collector by S. 6 (1) in making the selection that 'we spell out a right' in the family. Hereditary rights were well known to law as administered in this Presidency. The Legislature enacted that the new offices to be created for the new villages by that very Act should also be hereditary. As I read the section, what has been done by the Legislature is this—hereditary rights existing in the family of the last holder have been recognised and preserved by the Legislature by S. 6. In my view, it is not a case of any right being 'created' for the first time in the family, but the case is one of recognition and preservation by the Legislature of a pre-existing legal right existing in the family. The law is familiar with (*a*) rights vested in an individual; (*b*) rights vested in a family; and (*c*) rights vested in the public. The present is a case of a 'right vested in a family'—which was a well-known right before the Act—being recognised and provided for by the

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Legislature. If the Legislature intended that such pre-existing rights should cease once for all and be no longer entitled to any sort of legal recognition or enforcement, it would surely have chosen other words than those that exist in the section to express its intention. It is a principle of law that existing legal rights should not be intended to be interfered with or taken away, except to the extent to which it is reasonably clear under the terms of a statute that they have been. A provision like the one contained in the last sentence of S. 6 (1) of Act III of 1895 finds a place also in Madras Act II of 1894, S. 15; and under that Act, learned Judges of this Court have held that the last holder's family has got a legal right of suit in the Civil Court when the hereditary right is infringed by the Revenue Officials in the matter of making appointments in such cases. See *Krishnaswami Naidu* v. *Akkulammal*[1], *Kodandaramayya* v. *Ramalingayya*[2] and *Alagiasundaram Pillai* v. *Midnapore Zamindari Co.*[3] (per Odgers, J.). *See also* per Wallace, J., in *Subba Rao* v. *The Secretary of State*[4]. In those decisions learned Judges of this Court have held that Civil Courts have jurisdiction to entertain suits in cases similar in principle to the present, and that necessary declarations could be granted to the family of the last holder. If the right possessed by the family be not a legal right, it is difficult to support the decisions mentioned above by those learned Judges. As remarked already, it is difficult to say that the obligation cast on the Collector by S. 6 is not mandatory. If not mandatory, the provision should be treated as only in the nature of an administrative instruction, and to be really directory only, but it is impossible *prima facie* to understand that the Legislature intended to do any such thing in the main enacting section of the Act, which admittedly deals with important legal rights, and that it enacted a clause with the use of the word "shall" intending thereby only to give some sort of administrative advice to the authority which it empowered to make such appointments. Such a suggestion is, in my opinion, most unlikely, having regard to the wordings of the enactment and to the circumstances that the same clause occurs both in the Act of 1894 and in the Act of 1895. As already remarked, a different language would have been employed if the provision was not intended to be mandatory in its

1. (1918) 9 L. W. 90. 2. (1920) 12 L. W. 663.
3. (1919) 12 L. W. 767. 4. (1929) 58 M. L. J. 698.

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character, and any administrative instruction would naturally be dealt with under S. 20 which makes provision for rules to be framed by the Board of Revenue.

I may remark that in *Alagiasundaram Pillai* v. *Midnapore Zamindari Co.*[3] Justice Bakewell made the following remarks towards the end of his judgment:—

"For the same reason I am of opinion that the ruling of Napier, J., in the case already cited *Krishnaswami Naidu* v. *Akkulammal*,[1] does not apply, because the plaintiffs claim a personal right and not as members of the public. I do not understand that ruling to apply to an appointment outside the family of the last holder, in which case the member of the family might sue on behalf of himself and all other members of the family, because their joint right to be considered had been infringed."

For these reasons, and speaking with all respect, I think that the decision in *Kanthavadivelu Mudaliar* v. *Ramaswami Mudaliar*[5] has not properly taken into consideration the wordings of S. 6 and the inferences following from the same, and would also seem to be in reality inconsistent with the decisions of various learned Judges in the cases mentioned above, and I would accordingly respectfully dissent from the same.

The second point raised is that even if it should be held that the plaintiffs have a legal right, the same is not available to be enforced in the Civil Courts having regard to the provisions of S. 21 of the Act. It has been decided by Sadasiva Aiyar, J., in *Krishnaswami Naidu* v. *Akkulammal*[1], by Ayling and Coutts Trotter, JJ., in *Kodandaramayya* v. *Ramalingayya*[2], by Odgers, J., in *Alagiasundaram Pillai* v. *Midnapore Zamindari Co.*[3] and by Miller, J., in *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*[6] that S. 21 of the Act takes away the jurisdiction of the Civil Courts only in cases in which jurisdiction is conferred on the Revenue Courts by S. 13 of the Act. Ss. 13 and 21 deal only with claim to succeed to the office. So far as the case before us now is concerned, when the old office is abolished and ceases to exist, the appointment to the new office could not be said to be by virtue of a claim to succeed. This was the view of Sadasiva Aiyar and Odgers, JJ., in the cases mentioned, and is the view taken by Kumaraswami Sastriar, J., in the second appeal in the present case; and, with

1. (1918) 9 L. W 90.
2. (1920) 12 L. W. 663.
3. (1919) 12 L. W. 767.
5. (1927) 54 M. L. J. 357.
6. (1907) I. L. R. 30 M. 126: 16 M. L. J. 514.

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respect, I agree with those learned Judges in that view. As observed by Ayling and Coutts Trotter, JJ., in *Kodandaramayya* v. *Ramalingayya*[2]

"That a suit should be in a Civil Court regarding a newly created village office and its emoluments, whereas it would not be in the case of an older office, is anomalous and may be the result of oversight in drafting; but we cannot see that it involves any injustice or real inconvenience; and however it may be it seems to be the only proper interpretation of the two Acts."

It may be mentioned for what it is worth, that though the Act was amended in 1930 in respect of some other matters, the Legislature did not make any amendments to Ss. 6, 13 or 21, as it might be expected to do having regard to the difference of opinion that prevailed in this Court about the construction of S. 13 of the Act, since Justice Bakewell had taken a contrary view, if the Legislature thought that its intention has been misunderstood by Courts.

On the merits I think the learned Judge Kumaraswami Sastriar, J., is clearly right in his opinion that the family of the last holder is Myneni. As remarked by the learned Judge, Exhibit C is practically conclusive on the question. It may be observed that the Collector on appeal in fact decided that Myneni family was the family of the last holder. It would appear that by reason of some other proceedings, the Board of Revenue came to a contrary conclusion. But the Collector's decision on appeal in such cases is final, and it has not been made clear in this case how the Board of Revenue happened to interfere with that decision of the Collector. In fact, when the Board of Revenue was subsequently approached to interfere with a later order passed by the Collector on appeal relating to the appointment of the present defendant to the office, the Board held that it had no jurisdiction to interfere with an order passed by the Collector on appeal in such a matter. *See* Exhibit P. 2. The plaintiffs before filing the present suit had also filed a suit under S. 13 of Madras Act III of 1895 before the Deputy Collector, Tenali Division. Having failed to obtain relief from the Deputy Collector, the plaintiffs appealed to the District Collector (Exhibit Q. 3), who held that "any suit for a newly created office will, if maintainable at all, lie only to the ordinary Civil Courts." In the present case, it

2. (1920) 12 L.W. 663 at 666.

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is clear that the last holder's family was Myneni family, and therefore the appointment of the defendant as the permanent Village Munsif of Dhulipudy is illegal. The declaration granted by the learned Judge to that effect will stand, but not the other declarations. With this modification, the Letters Patent Appeal is dismissed with costs.

Reilly, J.

Reilly, J.—Section 6 (1) of the Madras Hereditary Village Offices Act provides that on the grouping, amalgamation or division of villages all hereditary village offices of certain classes in the villages so affected shall cease to exist and new hereditary offices shall be created for the new villages formed as the result of grouping, amalgamation or division. The sub-section then lays down that in filling the new offices so created the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. It will be seen that the sub-section provides for very serious matters,—the abolition of hereditary offices and the creation of new hereditary offices in their stead. Between the old and the new offices a link is maintained; the Collector must fill the new offices with the persons whom he considers best qualified from among the families of the last holders of the old offices. It is a very serious thing indeed for the Legislature to destroy a private right, and still more a hereditary right; and we must be very sure before we attribute that meaning to a provision in a statute. It is a serious and unusual thing for the Legislature to create new hereditary offices. Here we find a provision for the abolition in the public interest of highly prized hereditary offices, and in the very same sub-section of the Act we find provision for the creation of new hereditary offices in their stead. Then in the same sub-section words are introduced showing that it is the intention of the Legislature that the new offices shall be filled by men selected from the families which held the abolished offices. Surely that provision explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices. That is certainly a possible way of interpreting the intention of the Legislature in making the sub-section, and, remembering that very clear words are required entirely to destroy a private right, if we approach the

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sub-section in the right way in my opinion, it is clear that that is the proper interpretation. With great respect I am unable to agree with *Kanthavadivelu Mudaliar* v. *Ramaswami Mudaliar*,[5] in which the fact that the abolition of the old offices need not carry with it, and is apparently not intended to carry with it the entire abolition of the old hereditary rights appears to have been overlooked. I agree with my learned brother that sub-sec. 6 (1) of the Act preserves certain legal rights in the families of the last holders of the abolished offices.

That view is confirmed by the language of the sub-section regarding the Collector's duty in the matter. It lays down that the Collector shall select persons from among the families of the last holders of the abolished offices. I cannot agree with the contention for the defendant that those words are merely directory not mandatory. That is against the plain meaning of the words themselves, which fits in with the apparent intention of the sub-section. There is no suggestion that the Collector shall choose persons from those families, if he thinks fit; there is a plain order that he shall do so. And, as my learned brother has pointed out, if a mere direction was to be issued to the Collector how he was to use his discretion, S. 6 is not the place where such a direction would naturally appear.

If there is a right preserved in the families of the last holders of the abolished offices, by what remedy is that right to be vindicated when infringed? For the defendant it is contended that a new remedy of appeal is provided by S. 23 of the Act and that that is the only remedy. But here we have not a new right and a remedy created simultaneously by statute, in which case the ordinary interpretation will be that the remedy created is the only remedy available. Here we have an old right preserved and a new remedy created; but no old remedy is explicitly taken away. In those circumstances the new remedy of appeal is not exclusive; it must be regarded as additional to and not as substituted for existing legal remedies. On general principles, if the hereditary right preserved by S. 6 (1) of the Act is infringed, the persons for whom it is preserved have still a right to sue for its vindication by a declaratory decree.

5. (1927) 54 M. L. J. 357.

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It is contended for the defendant that at any rate the jurisdiction of the ordinary Civil Courts is excluded by the Act. The excluding provision is in S. 21; but that must be strictly construed, as must all provisions shutting out the jurisdiction of the ordinary Courts, and no reasonable interpretation of it will go so far as to shut out from the jurisdiction of the ordinaryCourts such a matter as is the subject of this suit—*Muvvula Seetham Naidu* v. *Doddi Rami Naidu*[7] and *Kodandaramayya* v. *Ramalingayya*[2]. I agree that the ordinary Civil Court has jurisdiction in this case.

On the question who was the last holder of the office of Village Munsif of Dhulipudy within the meaning of S. 6 (1) of the Act I agree that Exhibit C is conclusive.

In my opinion the plaintiffs are entitled to a declaration that the appointment of the defendant as permanent Village Munsif of Dhulipudy is illegal. But I do not understand how the findings of fact that Myneni Bhishiah was the last holder of the office or that the plaintiffs are the only surviving members of the last holder's family, from whom a selection should be made, can properly be made parts of the declaratory decree in their favour. I would modify the declaration made by the learned Judge by striking out all except the declaration that the appointment of the defendant is illegal.

B. V. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE CORNISH.

Kanji and Moolji Brothers .. *Appellants** (*Defendants*)

v.

T. Shanmugam Pillai .. *Respondent* (*Plaintiff*).

Kanji & Moolji Bros. v. Shanmugam Pillai.

Registration Act (XVI of 1908), *Ss.* 17 (1) (*b*) *and* (*d*) *and* 49—*Unregistered agreement—Liberty to remove earth and sand—Covenant to level up land—Breach of—Suit for damages—Admissibility of terms of covenant—Transfer of Property Act (IV of* 1882 *as amended by Act XX of* 1929), *S.* 53-*A—Not retrospective.*

An agreement by which, on payment of Rs. 500 as compensation, the defendants were given the liberty to remove earth and sand from certain lands belonging to the plaintiff and the defendants also undertook to level the land after removal is not a lease or an agreement for the sale of earth and

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*O. S. Appeal No. 11 of 1932. 28th April, 1932.

2. (1920) 12 L.W. 663. 7. (1909) I.L.R. 33 M. 208: 20 M.L.J. 91.

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sand as chattels. It is an agreement for the sale of an interest in immoveable property.

Lavery v. *Pursell*, (1888) 39 Ch. D. 508 and *Morgan* v. *Russell & Sons*, (1909) 1 K. B. 357, relied on.

Where such an agreement is not registered, it cannot be received as evidence of any transaction affecting the property but is admissible to prove the terms of the covenant to level up the land after removing earth and sand.

Section 53-A of the Transfer of Property Act, introduced by the Amending Act XX of 1929, is not retrospective. It does not apply to an agreement to transfer immoveable property made prior to the 1st April, 1930.

On appeal from the judgment of the Honourable Mr. Justice Stone, dated 19th January, 1932 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 39 of 1931.

Suit for damages for breach of covenant. The agreement in suit was in the following terms:—

"Whereas the lessees have contracted with the M. & S. M. Railway Company for the supply of sand for levelling and filling and for that purpose requested the lessor to allow them to dig up and remove the sand or earth from his land described above.

Now this agreement witnesseth as follows:—

1. That the lessor has received from the lessee a certain amount as compensation.

2 That the lessee shall be at liberty to remove sand or earth from the plots abovementioned from 2 feet to 8 feet deep and level the plots after removal. The excavation should be the same level of adjacent plots.

3. The lessee is also permitted to lay the Railway sidings through the abovementioned lands.

4. . * * * * * *

5. The land is to be vacated on or before 1—10—1928 after the removal of sand."

As the learned trial Judge observed, there was nothing in the agreement, to suggest that the "lessee" was given exclusive possession or that the licence itself was sole and exclusive, though the parties denominated themselves as 'lessor' and 'lessee' and the last clause used language more appropriate to a lease than a licence. He held that it was 'a licence coupled with an interest and an interest in land' and, though unregistered, the plaintiff was entitled to enforce the agreement on the ground of part-performance under S. 53-A of the Transfer of Property Act.

Vere Mockett instructed by *N. T. Shamanna* for appellants.

T. M. Krishnaswami Aiyar and *S. G. Sadagopa Mudaliar* for respondent.

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Cornish, J.

The judgment of the Court was delivered by

Cornish, J.—The defendants are the appellants. They were sued for damages for breach of a covenant to level plaintiff's land after removing earth and sand therefrom. The plaint alleged an agreement, dated 25th June, 1927. The defendants in their written statement denied this agreement. But they alleged an unregistered agreement in writing, dated 4th August, 1927, under which, and in consideration of a rent of Rs. 500, they took on lease the suit lands subject to the covenants contained in the agreement; and they further pleaded that "all conditions and covenants binding on the part of the defendants were duly performed and that the lands were properly levelled".

The learned trial Judge has found that the written agreement, dated 4th August, 1927, contained the contract between the parties. Having so found, the learned Judge, rightly in our judgment, held that the agreement was for the transfer of an interest in immoveable property. The terms of the agreement were that in payment of compensation (in point of fact a sum of Rs. 500) the defendants were given liberty to remove sand and earth from the plaintiff's plots of land to depths varying from 2 ft. to 8 ft. and were to level the plots after removal. There was also the stipulation that the land was to be vacated on or before 1st October, 1928. Although the parties are described in the document as lessor and lessee, the agreement was not, in our view, one of lease. Further, the agreement gave more than a mere licence, and it was not an agreement for the sale of earth and sand as chattels. In our view it was an agreement for the sale of an interest in immoveable property. A number of cases, which are not all easily reconcilable, have been cited to us on the question as to what constitutes an agreement for the transfer of an interest in land. In *Marshall* v. *Green*[1] a sale of growing timber, to be taken away as soon as possible, was held not to be a contract for the sale of an interest in land. Brett, J., in that case laid down the following test:—

"If they (the things sold) are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the

1. L. R. (1875) 1 C. P. D. 35.

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contract is the interest in land, and the case is within the section (*i.e.*, S. 4 of the Statute of Frauds). But if the thing, not being *fructus industrialis*, is to be delivered immediately . . . then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th section."

It was obviously with this authority before him that Collins, C. J., in the Full Bench case of this Court, *Seeni Chettiar* v. *Santhanathan Chettiar*[2] stated that it had long been settled that an agreement for the sale of growing timber, not made with a view to immediate severance from the soil and delivery as chattels, was a contract for the sale of an interest in land. *Marshall* v. *Green*[1] was discussed and criticised by Chitty, J., in *Lavery* v. *Pursell*,[3] and the learned Judge points out that the decision turned on this,—that the Court considered that as the timber was to be cut down as soon as possible, and was immediately cut down, the thing sold was a chattel. In *Lavery* v. *Pursell*[3] the contract was for the sale of a house as building materials, and it was held to be a sale of an interest in land; and Chitty, J., finds his conclusion thus :

" I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession; but still a possession of the soil itself—of the land, tenements and hereditaments; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute."

The learned Judge then proceeds to show that *Marshall* v. *Green*[1] was not an authority to the contrary. That reasoning and the conclusion appear to us to be exactly applicable to the agreement with which we are here concerned. Furthermore, the present case is really indistinguishable from *Morgan* v. *Russell & Sons*[4] where it was held that an agreement to sell all the slag and cinders forming part of the soil on certain premises was a contract to grant an interest in land.

The agreement then, purporting to create an interest in immoveable property, and being unregistered, the question is whether S. 49 of the Indian Registration Act does not prevent the plaintiff from proving the terms of the agreement. The learned trial Judge has held that the equity of part perform-

1. L. R. (1875) 1 C. P. D. 35.
2. (1896) I. L. R. 20 M. 58: 6 M. L. J. 281 (F. B.).
3. (1888) 39 Ch. D. 508.
4. (1909) 1 K. B. 357.

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ance established by S. 53-A of the Transfer of Property Act enables the plaintiff to enforce his rights under the agreement, notwithstanding that it has not been registered as required by law. It is unnecessary to consider the argument which has been addressed to us on the subject whether the learned Judge put a right construction on the section, because, in our judgment, the section has no application to an agreement to transfer immoveable property which, as in the present case, was made prior to 1st April, 1930, the date on which S. 53-A is expressed as coming into force. Act XX of 1929, which introduced S. 53-A into the Transfer of Property Act, says that the Act, viz., the amending Act, shall come into force on 1st April, 1930, and the language of S. 53-A itself does not indicate an intention that it should come into force on any other date. But it has been contended, in view of the provision in S. 63 of the Act, that certain specified sections (which do not include S. 53-A) shall not affect the terms and incidents of transfers of property made prior to 1st April, 1930, that the inference is that S. 53-A was intended to have retrospective effect on transfers of property. Their Lordships of the Judicial Committee in *Young* v. *Adams*[5] have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test, Act XX, in our opinion, fails to disclose an intention that S. 53-A was to have a retrospective effect. In support of the contention reference has been made to Act XXI of 1929, which is entitled "An Act to supplement the Transfer of Property (Amendment) Act XX of 1929". This Act is likewise expressed to come into force on 1st April, 1930. It does not amend Act XX, but it amends S. 49 of the Registration Act by enabling an unregistered document to be received as evidence of part performance of a contract for the purposes of S. 53-A of the Transfer of Property Act. Act XXI is supplementary of Act XX, and its provisions must be construed accordingly. And if, as we think, S. 53-A is applicable only to transfers of immoveable property made after 1st April, 1930, it must follow that the operation of the amendment made by Act XXI to S. 49 of the Registration Act should be similarly restricted.

Now, if the plaintiff cannot rely on S. 53-A the equity of part performance cannot help him. Although in *Mahomed*

5. (1898) A. C. 469.

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Musa's case[6] their Lordships of the Judicial Committee laid down that the equitable doctrine of part performance was applicable in India, their Lordships in the later case of *Ariff* v. *Jadunath Majumdar*[7] held that the equity could not override the provisions of a statutory enactment. It is clear, therefore, upon this authority that the agreement of the 4th August being a document which required registration, is prevented by S. 49 of the Indian Registration Act (the amendment of this section by Act XXI of 1929 not being effective for the purpose of this case) from being received as evidence of any transaction affecting the property, and that no equitable doctrine can nullify the operation of the section. The words "transaction affecting such property" in S. 49 have been held to mean transaction purporting or operating to create, declare, assign, limit or extinguish a right, title or interest in immoveable property: *Saraswatamma* v. *Paddayya*[8]. To that extent, therefore, the unregistered document would not be receivable as evidence of its terms. The question is whether the covenant that defendants would level plaintiff's land after removing the sand to the same level as adjacent plots operates to create or declare a right, title or interest in or to immoveable property. The covenant certainly operates to create a right in the plaintiff to have something done to his land, and an obligation on the defendants to do it. But we think that the right and obligation so imposed cannot be described in the ordinary sense of the words as "a right, title or interest in or to immoveable property". If this be the correct view, then the document is admissible to prove the terms of the covenant. The learned counsel for the defendants has, however, contended, upon the authority of *Sambayya* v. *Gangayya*[9] that the covenant is inseparable from the agreement and must stand or fall with it. But in that case the covenant was by the lessee to purchase the premises at the end of the term ; it was clearly an agreement to create an interest in land. On the other hand, it is well settled that an unregistered document is admissible as evidence of a personal covenant or of a collateral transaction which does not require registration. It is to be observed that the covenant in question

6 (1914) L.R. 42 I.A. 1 : I.L.R. 42 Cal. 801 : 28 M.L.J. 548 (P. C.).
7. (1931) L.R. 58 I.A. 91 : I.L.R. 58 C. 1235 : 60 M.L.J. 538 (P. C.).
8. (1922) I.L.R. 46 M. 349 : 44 M.L.J. 45.
9. (1890) I.L.R. 13 M. 308.

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is not a repairing covenant. It did not require the defendants to restore the land after excavating the sand; but they were required to level the land to the level of adjoining lands so as to make it similarly cultivable. In our judgment the covenant was an arrangement collateral to the agreement, and one which did not affect the land within the meaning of S. 49.

There remains to be briefly noticed the contention that the defendants had admitted the terms of the covenant in their written statement. They admitted that the August agreement contained covenants, and they averred that they had fulfilled the covenants. But nowhere do they admit the terms of the covenant; they were not discoverable anywhere in the pleadings, and, curiously enough, the plaint makes no mention of the August agreement.

The result of our judgment is that although our reasons are different, our conclusion is the same as that reached by the learned trial Judge. Accordingly, the appeal fails and must be dismissed with costs. The learned Judge has assessed the plaintiff's damages at Rs. 3,000 for defendants' breach of their covenant to level his land. The plaintiff claimed Rs. 6,000. The only evidence given in the case on this subject was the plaintiff's who said that he thought the cost of levelling the land would be Rs. 5,000. The learned Judge made a personal inspection of the land but it was under water at the time so that the occasion was not favourable for testing the plaintiff's estimate of damage. Mr. Mockett has told us that defendants had witnesses to give evidence upon the question of damages, but that they were not called because the arguments were confined to the questions of law. In the circumstances, we think that defendants should have the opportunity of calling these witnesses and that the case should go back to the learned Judge for this purpose.

The question of costs at the trial will abide the result of the further enquiry by the trial Court into the question of what damages (if any) are payable by the defendants. There will be no refund of the Court-fee paid on the memorandum of appeal herein.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Pitchai .. *Petitioner* (Respondent in Cr. R. C. No. 285 of 1932 on the file of the High Court)*

v.

Muna Muna Chena Muhammad Atham Sammatti and others .. *Respondents.*

Pitchai *v.* Muhammad Atham Sammatti.

Criminal Procedure Code (V of 1898), S. 144—High Court—Power to stay—Government of India Act (1915), S. 107—Interference in revision—Forfeiture of tenancy—Order under S. 144 evicting tenant—Propriety of.

The High Court has the power to stay the execution, or suspend the operation, of an order, positive or negative, passed under S. 144, Criminal Procedure Code.

The High Court can entertain an application to revise an order passed under S. 144 although the parties could have appealed to the District Magistrate who, under S. 144 (4), has the power to rescind or alter the order.

Saturhan Das v. *Makhan Das*, (1921) 72 I. C. 171, referred to.

Even if a tenant in possession has, by a breach of the conditions of tenancy, rendered himself liable to ejectment, it does not justify an order under S. 144 of the Criminal Procedure Code, evicting him from the land unless by no other means could a breach of the peace be prevented.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order vacating the order of the High Court, dated 19th April, 1932, and made in Cr. M. P. No. 270 of 1932 directing the suspension of the order of the Sub-divisional Magistrate of Ramnad in Mis. Case No. 20 of 1932.

K. S. Jayarama Aiyar and *G. Gopalaswami* for petitioner.

B. Sitarama Rao for respondents.

The Court made the following

ORDER.—This is an application to this Court to vacate the order, dated 19th April, 1932, in Cr. M. P. No. 270 of 1932 by which the order of the Sub-divisional Magistrate of Ramnad under S. 144 of the Code of Criminal Procedure was suspended in its operation—the first ground taken is that this Court had no power to suspend the order. The argument adopted is that powers of revision are exercised under S. 435 (1), Criminal Procedure Code, which only applies to suspension of execution of imprisonment or fine or under S. 439, Criminal Procedure

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* Cr. M. P. No. 295 of 1932. 27th April, 1932.

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Code. Mr. Jayarama Aiyar has taken me through various sections of the Code mentioned in S. 439. Ss. 423, 426, 427, 428 and 338 none of which he argues applies to this case, and I agree. Now there are certainly sections of the Code such as S. 188 under which execution of orders passed therein can be suspended, but they do not fall under any of the sections mentioned in S. 439, Criminal Procedure Code. No doubt S. 520 specially provides for stay of execution under Ss. 517, 518 and 519. Mr. Jayarama Aiyar argued that such orders as are positive and not negative would come under S. 426 and he even argues that a positive order under S. 144 would fall under it. That section begins with the words, "Pending any appeal by a convicted person". These words govern the whole section. It therefore follows in my opinion that where there is no appeal pending by a convicted person the section cannot come into force; and it cannot be invoked. It seems, therefore, obvious that since there are orders execution of which can be stayed by this Court which do not fall under S. 439 read with S. 426 they are either dealt with under S. 561-A in the exercise of its inherent powers or under S. 107 of the Government of India Act. Thus there is no section (apart from S. 561-A) in the Code of Criminal Procedure which enables the High Court to stay criminal proceedings. It is not correct to say that therefore any power of stay which cannot be found within the four corners of the Code cannot be exercised, if we assume, as Mr. Jayarama Aiyar does, that S. 561-A cannot be invoked. In this connection *Chockalingam Ambalam* v. *Emperor*[1] may be referred to. I have been shown no case where it has been held that this Court has no power of stay of execution of an order, positive or negative, passed under S. 144. *Marudayya Thevar* v. *Shanmugasundara Thevar*[2] was quoted. This was under S. 145 and it related to the appointment of a Receiver. I am doubtful whether the analogy as to the power of the Court to appoint a Receiver under S. 145 can be carried so far as to prohibit the Court staying execution of an order under S. 144. If that reasoning is carried further, it will equally prevent the Court staying positive orders under S. 144, which Mr. Jayarama Aiyar at the end of his argument admitted the Court could do.

The second argument is that no revision petition lies to this Court as the parties could have gone to the District Magis-

1. 1927 M. W. N. 716.   2. (1925) 49 M. L. J. 593.

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trate under S. 144 who has power to rescind or alter an order under S. 144 (4). It is argued that these powers of the District Magistrate are appellate powers and therefore under S. 439 (5) no appeal having been made to him, no revision petition to this Court can be entertained. Several cases have been quoted on the analogy of the old S. 195 (7) but I do not think they have any bearing on this case for the simple reason that that section did not empower the Court to revise or change an order passed by itself which S. 144 (4) does, and all the cases quoted proceed on the footing that the appellate or revising Court is superior to the Court whose order is sought to be appealed against or revised. The peculiarity of S. 144 (4) is that it enables the Magistrate who passed the order to rescind or alter it. This power therefore of a superior Magistrate when he proceeds to do the same thing must be similar in its essence. It appears to me, therefore, that nothing can be gathered from cases which discuss whether revisional and appellate powers are the same or different things. Here we are dealing with a peculiar section, namely, S. 144 (4), conferring a jurisdiction upon a Magistrate which, whether even if it can be called appellate or revisional, cannot be so called in the ordinary sense of those words namely of a superior Court dealing with an inferior one. There is one direct decision on the point, and it is the only one which has been quoted to me, namely, *Saturhan Das* v. *Makhan Das*[3]. It was there held that the jurisdiction conferred by S. 144 (4) of the Code of Criminal Procedure upon a Magistrate to rescind or alter an order made under the section by himself or any Magistrate subordinate to him or by his predecessor in office is neither appellate nor revisional jurisdiction; it is a special jurisdiction conferred by a special provision of the statute. Therefore in my opinion this argument that a revision petition cannot be filed to this Court must be rejected. I should not, however, be understood as in any way encouraging direct applications to this Court, when there is some Magistrate who can alter or rescind the order, but this Criminal Revision Petition has already been admitted in this Court, and I am not prepared to hold that it could not be filed here.

On the merits of the present petition I propose to say very little because the main question as to whether the agreement

3. (1921) 72 I. C. 171.

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between the present petitioner and the counter-petitioners is a lease or a licence is one which will more properly come up in deciding the criminal revision petition itself. But it seems to me perfectly clear that the view which the learned Magistrate took in passing the order was that this was an ordinary lease and that since the parties under the lease had to vacate as they did not pay their rent within the specified time the petitioner before him was entitled to have an order under S. 144 excluding the counter-petitioners before him from the site. A few sentences of the order may be quoted.

"The principal contention of the counter-petitioners is that the clause in the rajinama that the defaulters should forfeit the lease is not intended to operate but is only introduced *in terrorem* and that it is not valid in law even otherwise."

Then he says:

"In a nutshell their case is even though they have violated the condition of the rajinama with regard to the payment of the dues to the proprietor of the lands the lease is subsisting and that they have every right to be on the lands in question."

He proceeds then to say:

"The terms of the rajinama are quite clear that in default of payment of the dues to the proprietor of the lands even after the expiry of one month's days of grace with interest thereon at 12 per cent. per annum the counter-petitioners shall forfeit their subsequent right of the fishing lease on the lands."

It may be noted that in the compromise petition liberty to build houses, etc., was granted and the petitioners could remove them at the end of the lease. Nowhere in the order so far as I can see does the learned Magistrate appear for a moment to regard the compromise as a licence and not as a lease. If he viewed it as a lease, he was not correct in passing the order evicting the petitioners from it, even though liable to eviction in a Civil Court unless by no other means could a serious breach of the peace be prevented. It was for the landlord, in the view taken by the Lower Court, to evict them by civil process. It was for that reason, apart altogether from the question as to what the compromise really meant, that I considered this order was *prima facie* wrong and should be suspended. After reading the affidavits on both sides I do not see sufficient reason to vacate my order, dated 19th April, 1932, but I wish to make it clear that I am in no way deciding the question whether the agreement is a licence or lease.

S. R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Mara Ramanarasu .. *Appellant** (*Counter-petitioner—Decree-holder*)

v.

Matta Venkata Reddi (dead) and others, represented by their mother and guardian Matta Ademma (*vide* Order, dated 8th January, 1929, C. M. P. No. 1085 of 1928). *Respondents* (*Petitioner in E. A. No.* 2198 *of* 1926, *Petitioner in E. A. No.* 6 *of* 1927, *and nil—Judgment-debtor, Purchaser and nil*).

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Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 2—*Contract containing promise by judgment-debtor to do something at future date—Acceptance by decree-holder as immediate adjustment—Application for entering satisfaction—Sustainability.*

A completed contract, by which the judgment-debtor promises to do something at a future date, can be accepted by the decree-holder as a legal and immediate adjustment in satisfaction of his decree and can form the basis of an application under O. 21, R. 2, Civil Procedure Code, to get satisfaction recorded.

Muthu Vaithilinga Mudaliar v. *Subbaraya Chettiar*, 1930 M. W. N. 137, disapproved.

Lachhman Das v. *Baba Ramnath Kalikamliwala*, (1921) I. L. R. 44 All. 258 and *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation, Ltd., London*, (1917) 43 I.C. 537, considered.

Appeal against the order of the District Court of Kistna at Masulipatam in Appeal No. 60 of 1927 preferred against the order of the Court of the Principal Subordinate Judge of Bezwada in E. A. No. 2198 of 1926 in E. P. No. 53 of 1926 in O. S. No. 24 of 1922.

G. Lakshmanna for appellant.

P. Venkataramana Rao for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In O. S. No. 24 of 1922 on the file of the Subordinate Judge of Bezwada the appellant before us obtained a decree for sale on a mortgage against one Venkata Reddi for something over Rs. 3,500. In O. S. No. 25 of 1922 he obtained a decree on another mortgage deed executed in his favour by Venkata Reddi's brother, Rami Reddi. In O. S. No. 25 of 1922 he brought the property to sale and himself purchased it for Rs. 1,750 less than what was due on Rami Reddi's mortgage, and for the Rs. 1,750 he obtained a

* C. M. S. A. No. 13 of 1928. 24th March, 1932.

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personal decree against Rami Reddi. After that he brought the property covered by Venkata Reddi's mortgage to sale in execution. That sale was held on the 25th October, 1926. A man called Saiyed Murtuza Sahib was the successful bidder at that auction, and he deposited in Court on that occasion Rs. 952-8-0 as 25 per cent. of the amount of his bid. A few days after that sale it is admitted that the decree-holder, Venkata Reddi, and Saiyed Murtuza entered into an agreement, which is embodied in Ex. A, dated the 3rd November, 1926. According to Ex. A the land put up for sale in execution of the decree against Venkata Reddi, for which Saiyed Murtuza had been the successful bidder, was to be transferred to the decree-holder with the crops on it except the crops on two fields, and the amount paid by Saiyed Murtuza into Court, Rs. 952-8-0, was to be got back from the Court and paid to the decree-holder; to part of the land which the decree-holder had bought in execution of his decree against Rami Reddi, Venkata Reddi was to give up a claim which it appears he had put forward; four other items of land were to be transferred to Venkata Reddi or, if he chose, in respect of one of them Rs. 1,000 was to be paid by the decree-holder; the other consideration on his side was the amount of his decree against Venkata Reddi and the balance of his decree against Rami Reddi. It will be seen that the agreement embodied in Ex. A covers several matters beyond the scope of the decree against Venkata Reddi in O. S. No. 24 of 1922. On the 9th November, 1926, Venkata Reddi presented a petition to the Subordinate Judge, in which he alleged that the decree against him in O. S. No. 24 of 1922 had been adjusted in this way to the satisfaction of the decree-holder and prayed that satisfaction of the decree might be recorded. That petition it appears was posted to the 4th December, 1926, and on that day it was dismissed for default, because, as Venkata Reddi explains, though he was in the court-house, he was not in the court-room when he was called. On that very day he put in another petition, E. A. No. 2198 of 1926, to the same effect, and that is the petition with which we are concerned. The decree-holder, when he got notice of that petition, alleged that he had been induced by fraud to execute Ex. A, Venkata Reddi's object being to keep possession of the land concerned in O. S. No. 24 of 1922 and to reap the crops upon it. He denied that there had been any satisfaction of his

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decree, and he contended that at any rate Ex. A was not admissible in evidence because it was unregistered. The Subordinate Judge after taking evidence found that there had been no adjustment of the decree in O. S. No. 24 of 1922 and also found that Ex. A was inadmissible in evidence because it was unregistered. Venkata Reddi preferred an appeal to the District Judge, who found that Ex. A was admissible in evidence in consequence of the amendment of the law by Act II of 1927 and also found as a fact that there had been adjustment of the decree to the satisfaction of the decree-holder, and, therefore, he ordered satisfaction to be recorded. Against that decision the decree-holder has brought the present second appeal.

It is not denied, and it has not been denied at any stage, that the decree-holder executed Ex. A on the date it bears. The allegation that he was induced to do so by fraud has not been pressed before us nor apparently before the District Judge. It is not denied that it was intended by the decree-holder, when he executed Ex. A, that the terms of Ex. A should supersede the decree which he had obtained against Venkata Reddi. It is contended, however, that on the date of Ex. A there was no actual adjustment in satisfaction of the decree, but that Ex. A was only an agreement that the decree-holder would be satisfied, if certain things were done in accordance with Ex. A, which have not been done. And it is contended for the decree-holder before us that there can be no adjustment of a decree within the meaning of R. 2 of O. 21 of the Code by a mere promise to do something when that promise has not yet been carried out. In this case it is admitted that the promises contained in Ex. A have not been carried out. It has been found that the land has not been put into the possession of the decree-holder, as was intended. It has been found, and it is admitted, that the documents of transfer, which were to be executed by the parties, have not been executed. Therefore it is represented that all we have in this case on the side of Venkata Reddi is a promise to do things, which he has not done, and that it is contended could not be accepted by the decree-holder as an adjustment within the rule. The words of R. 2 of O. 21 are

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder . . ."

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Mr. Lakshmanna, for the decree-holder, contends in effect that a decree can be adjusted to the satisfaction of the decree-holder by something being paid by the judgment-debtor to the decree-holder or by some property being transferred by the judgment-debtor to the decree-holder or, as I understand him, by something being given up by the judgment-debtor to the decree-holder, but that an adjustment cannot be made to the satisfaction of the decree-holder within the meaning of the rule by a mere promise that the judgment-debtor will do something at some future date, though that promise may be a legally enforceable contract. That seems to me to be an exceedingly difficult proposition to establish. It is admitted that a decree-holder who has a decree for the payment of Rs. 1,000 in his favour may accept in adjustment of that decree to his satisfaction an immediate payment of Rs. 100; but it is contended that a decree-holder in whose favour there is a decree for the payment of Rs. 100 cannot legally accept in adjustment of that decree to his satisfaction a promise that the judgment-debtor will pay to him at some future date Rs. 1,000. The argument must go so far as that he cannot accept such a promise in whatever form it is either in a bond with sureties or in a mortgage deed. I cannot see any basis for such a contention; but it is alleged that there is authority to be found in *Lachhman Das* v. *Baba Ramnath Kalikamliwala*[1]. The head-note of that case in the report perhaps seems to suggest something of that sort. There it is stated

> "The judgment-debtor filed a petition alleging that the question of the execution of the decree had been settled out of Court by means of an agreement between the parties, under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immoveable property. The decree-holder denied that any such adjustment as alleged had taken place, and the judgment-debtor was unable to show that any part of the alleged agreement which, according to his own account of it, was to be performed by him, had been so performed. *Held*, that such an agreement as alleged could not be set up by the judgment-debtor under R. 2 of O. XXI of the Code of Civil Procedure as a bar to execution."

But I think when we examine that case with care, we shall find that it is no authority for any proposition so wide. In Mr. Justice Piggott's judgment at page 262 will be found a statement

> "That agreement was to the effect that the decree-holder would accept satisfaction of his decree in a modified form and would abandon the execu-

1. (1921) I. L. R. 44 All. 258.

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tion proceedings which were being taken, as soon as four specified conditions had been fulfilled by the judgment-debtor"

and it was found that none of them had been fulfilled. That was not a case therefore where it was found that the decree-holder had agreed to accept as immediate satisfaction a promise that something would be done in future by the judgment-debtor but a case where the decree-holder had agreed that, if at some future date the judgment-debtor did something, then he at that future date would accept satisfaction. The case so examined is no authority for the proposition that a promise to do something at a future date cannot be accepted by a decree-holder as a legal and immediate adjustment in satisfaction of his decree. Mr. Justice Walsh, in that case made a quotation with approval which appears to come from *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation, Limited, London,*[2] a decision of Seshagiri Aiyar and Bakewell, JJ., in this Court. The words of that judgment on which Mr. Justice Walsh relied—I quote them as they actually appear in *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation Limited, London,*[2] not with the slight variation with which Mr. Justice Walsh quoted them,—are

"An inchoate contract would not give the judgment-debtor a right to plead against execution that this contract should be completed and that he should then be permitted to plead that the transferee was only his *alias* and has no *locus standi*".

That an inchoate agreement cannot be pleaded as an adjustment within the meaning of Rule 2 of O. 21, I should have thought need hardly be stated, as it certainly cannot be disputed. I understand an inchoate agreement to be an agreement not yet concluded by the parties, an agreement which is still in the stage of negotiation, and it is perfectly obvious that a judgment-debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation. However Mr. Lakshmanna also relies upon a decision of Mr. Justice Curgenven in *Muthu Vaithilinga Mudaliar* v. *Subbaraya Chettiar*[3]. There the learned Judge understands *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation, Ltd., London*[2] to mean that

"so long as an agreement remains executory and has not been fully executed it cannot amount to an adjustment under O. 21, R. 2".

2. (1917) 43 I. C. 537.

3. 1930 M. W. N. 137.

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I think that is not what was laid down in *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation, Ltd., London,*[2] and, although the learned Judge adopted that as a proposition of law, with great respect I cannot agree with it.

In *Lodd Govindoss* v. *Ramdoss*[4] Mr. Justice Sadasiva Aiyar said that

" an adjustment referred to in Order 21, rule 2 of the Code of Civil Procedure is a transaction which extinguishes the decree as such in whole or in part".

Why should not a decree be extinguished by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a contract instead of the decree which he has in his hand ? A promise to do something in future is legal consideration, and, if a decree-holder thinks it is to his advantage instead of using his decree, the weapon which he has in his hand, to accept in its stead a promise that the judgment-debtor will do something in future, or if quite apart from any question of advantage, he chooses to accept such a promise, what is there in law to prevent him from doing so ? And why should not that be a legal adjustment ? It may well be said that, if a judgment-debtor comes into Court and alleges that the decree-holder has given up t[illegible] in his hand, the decree which he can exe[illegible] has accepted a promise that the judgm[illegible]tor will do something at a future date and if that i[illegible]uced, then the evidence that the decree-holder has don[illegible]uch a thing should be carefully scrutinised. It may very well be a foolish thing for a decree-holder to do; it may be unreasonably generous; it may be likely to give him a great deal of trouble in future. But, if it is proved that he has done so, that he has accepted a new contract in place of his decree as immediate satisfaction of that decree at the time of his acceptance, there is no legal impediment in the way of his doing so and there is no justification for the Court refusing to find on proper evidence that he has done so.

In the present case the learned District Judge has differed from the Subordinate Judge and has found as a fact that the decree-holder on the 3rd November, 1926, when he executed Ex. A, did accept as an immediate adjustment and satisfaction of his decree a new contract between the parties. Unfortunately

2. (1917) 43 I. C. 537.

4. 1915 M. W. N. 225.

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the learned District Judge has not discussed the evidence on this subject. The part of his judgment which deals with this matter is far briefer than it should have been; but he has arrived at a finding of fact, and, if we examine the evidence in this case, I do not think we can say that there is no evidence to support that finding of fact. In the circumstances it appears that there were some reasons for the decree-holder entering into a new arrangement with Venkata Reddi instead of pressing on with the execution of his decree. According to his account Saiyed Murtuza had no money for completing the purchase at the auction—indeed according to the decree-holder, Saiyed Murtuza had no money at all for that purchase, and the money paid had been provided by Venkata Reddi. At any rate his case is that Saiyed Murtuza would not be able to complete his purchase, and therefore the sale would have to be held over again, if execution was to go on. Moreover, there was a dispute in progress between the decree-holder and Venkata Reddi about some of the property which the decree-holder had bought in execution of the decree in the other suit as the property of Rami Reddi. There were, as Ex. A in the case shows, other matters in dispute between them. In those circumstances it would not be at all unnatural if the decree-holder thought it to his advantage to settle all the disputes and finish up the execution of his decrees against Venkata Reddi and Rami Reddi by a comprehensive agreement. But why should he have been content with promises that certain things would be done in future instead of requiring that they should be done at once? Why should he not have required that the sale deed for the property, which was to be transferred to him, should be executed at once? Why should he take a promise that that would be done in future? Ex. A seems to supply an answer. From the document it appears that the parties were not clear in their minds whether the transfer of the land concerned in the decree in O. S. No. 24 of 1922 should be executed by Venkata Reddi or by Saiyed Murtuza. It may be asked why was there any hurry to enter satisfaction at once before that question had been cleared up. The answer to that, I think, is to be found in the term in Ex. A regarding the Rs. 952-8-0, which Saiyed Murtuza had paid into Court. That Rs. 952-8-0, it will be remembered, was to be paid to the decree-holder. Now, if the auction sale in execution of the decree was not to

be completed, if Saiyed Murtuza was not in a position to pay up the other 3/4ths of the amount of his bid, which he had to do within 15 days from the date of the sale, *i.e.*, by the 9th November, 1926, then in the ordinary course of affairs under R. 86 of O. 21 the Rs. 952-8-0 would be forfeited to the Government. If that amount was to be recovered from the Court and to be paid to the decree-holder, the only way in which that was likely to be carried out was that the parties should be able to go before the Subordinate Judge not later than the 9th November and represent to him that the decree had been adjusted to the satisfaction of the decree-holder and that, therefore, there was no reason to keep this money any longer and no just reason to forfeit it to the Government. That shows that there was a reason why the decree-holder might be willing not only to settle up all the disputes between him and Venkata Reddi by a comprehensive agreement but to accept that agreement, although what Venkata Reddi had to do was to be done in the future, as an immediate satisfaction of his decree in order that they could go before the Subordinate Judge and represent that an adjustment had already been made. In the circumstances, whether the decree-holder was rash or not in taking that course, it will be seen that it would not be entirely unreasonable for him to do that.

And, when we look at his evidence, what do we find? It has been suggested by Mr. Lakshmanna that Venkata Reddi rushed into Court and tried to get satisfaction recorded prematurely, before he had done what he had to do. As I have pointed out, if that Rs. 952-8-0 was to be saved from being forfeited to the Government because Saiyed Murtuza was not in a position to pay up the remainder of his bid, then the 9th November, 1926, was the last day for going to the Court to make the representation that the decree had been adjusted and ask for the return of the Rs. 952-8-0. Therefore it cannot be said that Venkata Reddi moved prematurely. If it is suggested that at any rate he should have done something in fulfilment of the agreement and have executed the documents on his side before he went to Court, the answer is supplied I think by the evidence of the decree-holder. He says the agreement was that all the documents mentioned in Ex. A should be executed on the same day after the money in Court was paid to him. So that according to his own account the money

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had first to be recovered from the Court, and then both he and Venkata Reddi were to execute the transfer deeds in accordance with Ex. A. As I have pointed out, that money could not be recovered from the Court, and there was no hope of recovering it from the Court, unless a representation was going to be made to the Subordinate Judge within 15 days of the sale that there had been an actual adjustment to the satisfaction of the decree-holder. The decree-holder's evidence itself shows that he was well aware that the money was first to be recovered before the transfer deeds were executed and that is good evidence out of his own mouth that the effect of the transaction really was that he had been satisfied by an adjustment, by the new contract on the 3rd November, 1926. It appears to me therefore that, although the learned District Judge has not discussed the evidence in this case, there is clear evidence to support his finding that there was an actual adjustment to the satisfaction of the decree-holder on the date of Ex. A. Whether that was an adjustment into which the decree-holder was wise or unwise to enter is not a matter with which we are concerned. There is a finding of fact, with evidence to support it, that he did accept an immediate adjustment in satisfaction of his decree on that date. With that finding there is no sufficient reason for us to interfere, and, that being so, in my opinion this appeal fails and should be dismissed with costs.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—In execution of a decree for money obtained on a mortgage executed by the defendant in favour of the plaintiff the mortgaged properties were advertised for sale. A third person bid at the auction and deposited the necessary 25 per cent. of the purchase money. At that stage, the decree-holder mortgagee, the mortgagor—the defendant, and the auction purchaser, all the three together entered into an agreement, and relying on that agreement the defendant-mortgagor filed an application in the Lower Court for recording adjustment of the decree alleging that the adjustment was evidenced by that agreement. The mortgagee contended that there was no consideration for that agreement, and also raised other pleas. The learned Subordinate Judge found that the agreement between the parties had not been carried out by the defendant, and for that reason dismissed the application for recording satisfaction. On appeal, the learned District Judge came to the conclusion that there was a completed contract between the

parties, and directed that the adjustment should be recorded. The decree-holder mortgagee has preferred the present Civil Miscellaneous Second Appeal.

I may state at once that I must accept in this second appeal the finding of the learned District Judge that there was a completed contract between the parties. The wording of the agreement entered into by the parties lends support to the finding, as also the evidence of the decree-holder, given in these proceedings. The main argument advanced by the learned advocate for the decree-holder-appellant before us was that the defendant-mortgagor had not really carried out what he had to perform under the terms of this agreement, and that the agreement only evidences a promise on his part to do something in future and that such a promise would not be a ground for the Court recording satisfaction of the decree. I find myself unable to accept that contention. On the analogy of S. 62 of the Indian Contract Act, "if the parties to a contract agree to substitute a new contract for the old, the contract originally entered into between the parties need not be performed". If the decree-holder entered into a fresh contract with the judgment-debtor with reference to the satisfaction of the decree, then, unless there be anything illegal with reference to the new contract, the new contract would surely be a ground for the judgment-debtor applying to the Court to enter up satisfaction of the decree. No doubt if the substance of the new contract be to vary the terms of the decree, or to allow execution in a manner different from that directed by the decree, then, having regard to the provisions of S. 47, etc., of the Civil Procedure Code and the scheme of the Code as pointed out by the Privy Council in *Kotagiri Venkata Subbamma Rao* v. *Vellanki Venkatrama Rao*[5] the Court would not accept that new contract as a satisfaction of the decree when in essence it purports to vary the terms of the decree with a view to enable the parties to carry out in execution something contrary to the provisions of the decree. But when the new contract is not open to any such objection and is otherwise legal, I fail to understand why the same should not be a ground for the defendant asking the Court to enter up satisfaction of the decree. No doubt if the contract between the parties was that it is only the actual carrying out of the terms of the contract that should be the

5. (1900) L. R. 27 I. A. 197: I. L. R. 24 M. 1 (P. C).

Ramanarasu v. Venkata Reddi.

Anantakrishna Aiyar, J.

consideration for entering satisfaction of the decree, then no doubt unless those terms be carried out, it may not be open to the judgment-debtor to apply to the Court successfully to have the adjustment recorded. But the contention that even though there was a completed contract between the parties, yet if the contract be to do something in future and was really of an executory nature, then the defendant could not apply to record the adjustment is, I think, not supported by any provision of law to which our attention was drawn in this case. What the exact meaning of the expression "adjustment of a decree" as used in O. 21, R. 2 is, has been explained by Mr. Justice Sadasiva Aiyar in *Lodd Govindoss* v. *Ramdoss*[4]. The learned Judge there stated that "any transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree" is an adjustment of the decree. That opinion of the learned Judge was followed in *Azizur Rahman Choudhury* v. *Aliraja Choudhury*[6]. The learned advocate for the appellant, however, argued that the decision in *Lachhman Das* v. *Baba Ramnath Kalikamliwala*[1] is against this view. As my learned brother has pointed out in his judgment just now delivered, the headnote to the report of that case would seem to go beyond the terms of the judgment. That would seem to be a case where the decree-holder agreed to accept particular acts if actually done by the judgment-debtor as satisfaction of the decree which he was entitled to execute. It is the actual performance of particular acts mentioned by the judgment-debtor that was considered to be the real gist of the contract between the parties, which would enable the judgment-debtor to apply for recording satisfaction of the decree. Having regard to the terms of the judgment of Mr. Justice Piggott, I am not obsessed by that decision. On the other hand, as I have already remarked, it is open to the parties to provide for particular acts being done, or particular terms being actually carried out, as the consideration for the decree-holder agreeing to enter satisfaction of the decree. The decision in *Ramakrishna Kadirvelusami* v. *Eastern Development Corporation, Ltd., London*[8] only lays down, as far as I am able to understand it, that inchoate agreements could not be taken to be the basis for recording satisfaction of the decree. Unless there be

1. (1921) I L R. 44 All. 258.
2. (1917) 43 I. C. 537.
4. 1915 M. W. N. 225.
6. (1927) 32 C.W.N. 434.

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a completed contract between the parties, an inchoate agreement would only be a step, or steps, in the negotiations between the parties which may ultimately end or not end in a completed contract. No doubt there are certain observations in the judgment reported in *Muthu Vaithilinga Mudaliar* v. *Subbaraya Chettiar*[3] where the learned Judge, Curgenven, J., observes that a mere promise may not be enough to enable the judgment-debtor to apply under O. 21, R. 2; but the learned Judge in his judgment also uses the words "inchoate agreement"; and, as I already remarked, there is nothing in law which would enable the judgment-debtor to rely upon an inchoate agreement for recording satisfaction. If, on the other hand, the learned Judge really meant to lay down that a promise, though supported by consideration and otherwise legal, would never be the basis for an application under O. 21, R. 2, unless the same be actually carried out, then, with all respect, I find myself unable to agree. In the case before me, the terms of the agreement, coupled with the evidence given by the decree-holder himself, make it reasonably clear that the intention of the parties as evidenced by the agreement was that the same should be taken as an adjustment of the decree, since certain things contemplated by the parties could not be carried out except on this view of the agreement. If there is any doubt upon this point as to the meaning of the agreement, the decree-holder's evidence makes the matter reasonably clear. No doubt the agreement entered into by the decree-holder in this case seems to be rather of a complicated nature; and whether he was well advised in having entered into this contract in this particular case, is not for me to say. There is no finding that there was any fraud practised upon him, or that he was induced to sign the document without knowing the contents of the same. His deposition given in these proceedings makes it clear that he knew what the arrangement was. Being therefore of opinion that in this case there was a legal contract supported by consideration,—a completed contract entered into between all the parties interested,—by which the decree in question should be taken as satisfied and that the rights of the parties should be worked out on the basis of the new agreement, (which further contains a default clause, by which the parties are, in case of any default, allowed recourse to civil or criminal proceedings as may be deemed

3. 1930 M. W. N. 137.

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proper), I think that the defendant was entitled to have the relief prayed for by him in his application under Rule 2 of Order 21 granted to him. I agree with my learned brother that this appeal should be dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CORNISH.

Ponnamma .. *Appellant* (Plaintiff)*

v.

Marampudi Kotamma and others .. *Respondents (Defts.).*

Ponnamma v. Kotamma.

Indian Arbitration Act (IX of 1899), S. 4 (b)—Presidency Town—Arbitration to Panchayatdars—Oral submission—Award—Fresh suit barred.

The Arbitration Act does not say that an award upon an oral submission to arbitration of a matter which might have been the subject-matter of a suit institutable in a Presidency Town shall be invalid and inoperative.

Where a plaintiff claimed a declaration that she was entitled to plaint scheduled property and for delivery of possession and the defendant raised the plea that disputes having arisen between the parties previously the matter had been referred by them to arbitration to a caste panchayat in Madras, which had made an award in favour of the defendant and hence plaintiff was bound by the award,

Held, that the Indian Arbitration Act did not apply to the arbitration in question and therefore even though there was no written submission to arbitration, the award was binding upon the parties to it.

The consequence of the definition of "submission" in S. 4 of the Act is that the Act applies only to arbitration upon written submissions. Where there has been such a submission, the award is enforceable in the manner prescribed by S. 15. Where the award is made upon an oral submission, it is not enforceable in the manner prescribed by the Act. But it does not follow that an award is invalid and unenforceable because it cannot be enforced by the methods laid down in the Act.

Rukhanbai v. *Adamji*, (1908) I. L. R. 33 Bom. 69, dissented from.

Muhammad Newaz Khan v. *Alam Khan*, (1891) L. R. 18 I. A. 73: I. L. R. 18 Cal. 414 (P. C.), referred to.

Appeal against the decree of the Court of the City Civil Judge, Madras, dated 16th October, 1928 and passed in O. S. No. 323 of 1928.

K. Rajah Aiyar and *T. R. Srinivasan* for *K. Bhashyam Aiyangar* for appellant.

B. Manavala Chowdhuri for respondents.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—In the trial Court the plaintiff claimed a declaration that she was entitled to the plaint

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* C. C. C. Appeal No. 3 of 1929. 18th April, 1932.

Ponnamma v. Kotamma.

Beasley, C.J.

scheduled property and for delivery of possession of it and other reliefs. The defendants set up, amongst other defences, the defence that, disputes having arisen between the parties in or about February, 1928, with regard to the suit property, the matter was referred by them to a caste panchayat which made an award in favour of the defendants holding that the property belonged exclusively to them and pleaded that the plaintiff was bound by that award. The award of the panchayat having been proved at the trial through the leading headman of the caste panchayat, the learned City Civil Judge held that the plaintiff could not raise the same question in the suit having voluntarily submitted her case to arbitration and obtained an award. The plaintiff appeals.

It is argued here that there was no written submission to arbitration and that, therefore, the arbitration was not valid or binding upon the parties to it. It is conceded by Mr. Rajah Aiyar for the appellant that, if the arbitration had been in the mofussil, his client would have been bound by the award and that her suit in respect of the same matter arbitrated upon would not be maintainable. But his contention is that the arbitration in question was one to which the Indian Arbitration Act (IX of 1899) applies. That Act requires that there should be a written submission to arbitration. It is common ground that the provisions of the Indian Arbitration Act only apply to the Presidency Towns. That is made clear by S. 2 of the Act. If, therefore, the Act applies to a private arbitration such as this, then it is clear that a written submission to arbitration is required. It is contended by Mr. Rajah Aiyar that the Act applies to every arbitration held in Madras. On the other hand, it is contended by the respondents that the Act applies only to arbitrations started by a written submission to arbitration before a suit is filed and without the intervention of the Court and that in all other cases the Civil Procedure Code applies. In support of his argument Mr. Rajah Aiyar referred to *Rukhanbai* v. *Adamji*[1]. There the parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner

1. (1908) I. L. R. 33 Bom. 69.

Ponnamma v. Kotamma. — Beasley, C.J.

without going into formal evidence beyond the accounts, objections and surcharges filed before him. There was no written submission to arbitration. Beaman, J., held that the Indian Arbitration Act applied to such an arbitration; that, as there had been no written submission to arbitration as provided by S. 4 of the Act, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award had no legal foundation and could therefore have no legal consequences; and that, as there had been no reference to arbitration and no award, there could be no adjustment to give effect to under S. 375 of the Civil Procedure Code, which was what the plaintiff applied for. In my view, the Indian Arbitration Act is not a comprehensive Act and does not include all arbitrations and therefore the view taken by Beaman, J., in *Rukhanbai* v. *Adamji*,[1] is not the correct one. It is very probable that the Indian Arbitration Act was designed to suit the convenience of the commercial community in the Presidency Towns, and in order to enable them to decide disputes between themselves without the intervention of the Court and the Act therefore provides for the procedure to be adopted in such cases. It is quite clear that the Act is only intended to deal with cases where there has been a written agreement to submit the differences to arbitration. The Act throughout refers to submissions and a submission is defined in S. 4 (*b*) as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". After such a written submission the procedure provides for the intervention of the Court which in the Presidency Towns means the High Court. Courts here have always recognised such informal arbitrations as here and the second schedule to the Code of Civil Procedure by cl. 20 provides for arbitrations without the intervention of the Court. It is conceded that that clause refers to arbitrations whether there has been a written submission to arbitration or not; and it is difficult to see why such arbitrations in the Presidency Towns should be required to originate in a written submission whereas in the mofussil no such written submission is required; and there is abundant authority in support of the principle that an award under such circumstances in the mofussil can be relied upon as a defence in a suit relating to the

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1. (1908) I. L. R. 33 Bom. 69.

subject-matter dealt with by it (vide *Muhammad Newaz Khan* v. *Alam Khan*[2]) and indeed it is not disputed by Mr. Rajah Aiyar why should there be any distinction between those cases and informal arbitrations in the Presidency Towns? The Indian Arbitration Act is almost word for word the English Arbitration Act and under the English Arbitration Act such an award is not invalid. In the 12th Edition of Russell on "Arbitration and Award" it is stated at p. 336:

> "A parol submission is generally perfectly valid but it is not a submission to which the Arbitration Act applies."

In the footnote to paragraph 1071 of Vol. I (2nd Edition) of Halsbury's Laws of England dealing with references by consent out of Court it is stated:

> "The provisions of the Arbitration Act, 1889, are for the most part inapplicable where the submission is oral; *see* S. 27, which defines a submission for the purposes of the Act as a 'written agreement'. Consequently, where the submission is oral, the arbitration is governed by the common law."

In *Muhammad Newaz Khan* v. *Alam Khan*,[2] already referred to, *A* and *B* had referred certain matters in dispute between them to *X*. *X* made his award in favour of *A*. *A* made an application under S. 525 of the Code of Civil Procedure to file the award but it was dismissed. *B* then filed a suit to recover the properties which had formed the subject-matter of the dispute. *A* set up the award in answer to the claim. The Judicial Committee held that the award was a good and valid one and binding upon *B*. Their Lordships observed that though the application under S. 525 was refused, that merely left the award to have its ordinary legal validity, that it could not be successfully contended that an award is not valid because the party in whose favour it was had never applied to have it filed in Court and that the refusal to file the award or of an application made to do so could not have the effect that the award can never be relied upon in any suit relating to the subject-matter dealt with by it. The Indian Arbitration Act does not make such awards invalid. It merely deals, in my view, with a particular class of arbitration; and there are no words to be found in the Act rendering other arbitrations invalid. I am satisfied that the law with regard to arbitrations

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2. (1891) L. R. 18 I. A. 73: I. L. R. 18 C. 414 (P. C.).

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is the same here as in England and that the Indian Arbitration Act applies by S. 4 (*b*) only to arbitrations where there has been a written submission to arbitration in the same way as the corresponding section in the English Act, namely, S. 27, applies to such arbitrations. Both the Acts leave untouched the right of persons to agree to have the differences between them settled in an informal manner. In my view, the learned City Civil Judge was quite right in holding that the Indian Arbitration Act did not apply to the arbitration in question and that the award of the panchayatdars successfully barred subsequent action being taken. For these reasons, this appeal must be dismissed with costs.

Cornish, J.

Cornish, J.—I agree. It was conceded in the Lower Court that the respondents' plea that the suit is barred by an award upon the very subject-matter in dispute between the parties would be a good defence, if the award was valid. But the contention is that the award is not valid because the arbitration, being one governed by the Arbitration Act, was not upon a submission in writing as required by the Act. The consequence of the definition of "submission" in S. 4 of the Act is that the Act applies only to arbitrations upon written submissions. Where there has been such a submission the award is enforceable in the manner prescribed by S. 15. Where the award is made upon an oral submission it is not enforceable in the manner prescribed by the Act. But it does not follow that an award is invalid and unenforceable because it cannot be enforced by the methods laid down in the Act. R. 21 of the second schedule to the Civil Procedure Code, equally with S. 15 of the Act, requires that the award shall be filed in Court as a condition to enforcement. But their Lordships of the Judicial Committee held in ***Muhammad Newaz Khan* v. *Alam Khan***[2] that the validity of an award does not depend upon its having been filed in Court. The Arbitration Act does not say that an award upon an oral submission to arbitration of a matter which might have been the subject-matter of a suit institutable in a Presidency Town shall be invalid and inoperative. Apart from the procedure in the Act and in the second schedule to the Civil Procedure Code for enforcing awards, an award is enforceable by suit; and a suit will be the only means of enforcing an

2. (1891) L. R. 18 I. A. 73: I. L. R. 18 C. 414 (P. C.).

award when it cannot be filed in Court and enforced as a decree. This is the remedy available when an award, being upon an oral reference, is one to which the English Arbitration Act does not apply (*see* Redman on Arbitration, 4th Edition, p. 312), and there is no reason why the position should not be the same when for a like cause the Indian Arbitration Act is inapplicable to an award. In my judgment, the view held by Beaman, J., in *Rukhanbai* v. *Adamji*[1], that an award which is not made upon a written submission in an arbitration to which the Act applies has no legal foundation or consequence, is not warranted by anything contained in the Act. In the absence of any other ground being shown for impugning the validity of the award I think the Lower Court rightly held that it barred the appellant's suit.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

R. M. M. S. T. Vyravan Chettiar .. *Appellant** (*Applicant*)

v.

The Official Assignee of Madras .. *Respondent* (*Respondent*).

Contract Act (IX of 1872), Ss. 126 and 141—Applicability—Persons jointly and severally liable—Debt shared by both—Discharge of entire debt by one—Right of subrogation.

The contract of guarantee defined in S. 126 of the Contract Act is confined to cases of suretyship strictly so called. Cases where on the face of the contract two persons are jointly and severally liable do not fall within the definition.

Where, without any contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being as between the two that *of one of those persons only, and not equally of both*, the other, if he should be compelled to discharge the liability due to the creditor, though not a surety strictly so called, has nevertheless been in equity allowed to be subrogated to the rights of the creditor. But if the debt was borrowed by two persons jointly and severally bound as principals and shared by them—so that the debt was one equally of both—one of them is not, on payment even of the entire debt, entitled to the benefit of the security held by the creditor, in the absence of a contract with the creditor.

Duncan, Fox & Co. v. *North and South Wales Bank*, (1880) 6 A. C. 1, referred to.

William Rouse v. *Bradford Banking Co., Ltd.*, (1894) A. C. 586 and *Goverdhandas Gocuidas Tejpal* v. *The Bank of Bengal*, (1890) I. L. R. 15 Bom. 48, distinguished.

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*O. S. A. No. 98 of 1929. 8th March, 1932.

1. (1908) I. L. R. 33 Bom. 69.

Vyravan Chettiar *v.* The Official Assignee of Madras.

On appeal from the judgment of the Honourable Mr. Justice Waller, dated 8th October, 1929, in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 366 of 1929 in I. P. No. 278 of 1925.

K. S. Krishnaswami Aiyangar instructed by *N. T. Shamanna* for appellant.

O. T. G. Nambiar instructed by *Moresby* and *Thomas* for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—The facts out of which this appeal arises may be stated as follows. Two Chetties, R. M. M. S. T. Vyravan Chettiar who is the appellant before us and M. A. R. N. Ramanadhan Chettiar carrying on business under the vilasam of M. A. R. N., were in the habit of borrowing from the banks in Madras on joint promissory notes and utilising the amounts in equal shares. There were two such promissory notes with which we are concerned. On each occasion the amount borrowed was Rs. 50,000. The total amount borrowed being one lakh, each debtor took Rs. 50,000 for his own purpose. The dates of the two notes are 8th July, 1924 and 22nd April, 1925. On the 3rd August, 1925, M. A. R. N. was declared insolvent. It is admitted that the insolvent paid interest on his share of the debt on the 8th July, 1924, 8th October, 1924 and 8th January, 1925. He had certain shares in the Indian Bank from whom those debts were borrowed, and under Art. 19 of the Articles of Association of the Indian Bank, the bank had a lien on the shares. After the insolvency of Ramanadhan Chetty, the bank demanded the appellant for payment and he paid the whole debt. In respect of the moiety of the insolvent's debt he now claims to be subrogated to the benefit of the lien which the Indian Bank had over the shares, and this is claimed under S. 141 of the Contract Act. The Official Assignee representing the insolvent claims that the shares had vested in him free of any such lien. The matter came on before our brother Waller, J., and he found that no specific agreement as was alleged by the appellant to the effect that each debtor was to be surety for the other in respect of his moiety of the debt was made out. He therefore dismissed the application. This appeal is filed against his order.

We entirely agree with the learned Judge that the evidence does not make out any specific agreement between the parties to

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Ramesam, J.

the effect that, though as between the Indian Bank and the debtors they were jointly and severally liable, as between themselves each should be regarded as a surety for the other in respect of his moiety of the debt. Under the Indian Contract Act, the contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where on the face of the contract two persons are both jointly and severally liable do not fall within the definition. In other words, the contract of guarantee as defined in S. 126 of the Indian Contract Act is confined to cases of suretyship strictly so called. In *Duncan, Fox & Co.* v. *North and South Wales Bank*[1] Lord Selborne, L. C., distinguishes between three kinds of cases at page 11. The first case there mentioned is the only case covered by the Indian Contract Act. The second and third cases there enumerated are cases of suretyship loosely described as such. The second case is a case where there was an agreement between the principal and the surety only, the creditor being a stranger to it. The third case is a case where, without any contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt as between the two being of one of those persons only, and not equally of both. After eliminating the cases of suretyship strictly so called, the Noble Lord discusses at page 12 how far the person secondarily liable as surety is entitled to be subrogated to the rights of the creditor in the second and third cases. He refers to Lord Eldon's dictum in *Yonge* v. *Reynell*[2] and finally winds up by saying that even in the second and third cases the surety has some right to be placed in the shoes of the creditor where he paid the amount. The learned advocate for the appellant strongly relied upon this dictum and also the case in *William Rouse* v. *Bradford Banking Co., Ltd.*[3] But in this case there is an express agreement between the parties. He also referred to Rowlatt on Principal and Surety, page 7. But the passage at page 7 relies on the case in *Duncan, Fox & Co.* v. *North and South Wales Bank*[1] and does not carry the statement of the law beyond it. To make this passage applicable, the case must be one where the debt must be wholly of one and not equally of both. The whole foundation for the equitable doctrine of the English Courts of Equity is the argument of Sir Samuel

1. (1880) 6 A. C. 1. 2. (1852) 9 Hare, 809: 68 E. R. 744: 89 R. R. 689
3. (1894) A. C. 586.

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Romilly in *Craythorne* v. *Swinburne*[4]. That was a case of contract of guarantee in the strictest sense of the term. So also the cases reported in *Yonge* v. *Reynell*[2] and *Wythes* v. *Labouchere*[5]. Mr. Krishnaswami Aiyangar relied on Sheldon on Subrogation, S. 169. But that section does not very much help the appellant. The opening sentence shows that even in some States in America (Georgia, Albana and Vermont) right of subrogation among the parties jointly bound as principals is denied, though in other States such right of subrogation seems to have been recognised. There is no case in England where the Courts have gone to this length. On the other hand, the statement of the law in *Duncan, Fox & Co.* v. *North and South Wales Bank*[1] makes it subject to the limitation that the debt should not be equally of both. The case *Goverdhandas Goculdas Tejpal* v. *The Bank of Bengal*[6] is also a case of contract of suretyship strictly so called. The only point held there was that unless the surety pays down the whole money he is not entitled to the transfer of the security. We are not prepared to extend the legal position as laid down in English cases on the mere authority of the cases cited in Sheldon. The appeal fails and is therefore dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J.—The facts of this appeal are very simple. The appellant Vyravan Chetty, and another, who became an insolvent on the 3rd August, 1925, borrowed from the Indian Bank on two occasions, 8th February, 1924 and 22nd August, 1925, a sum of Rs. 1,00,000, the loan on each occasion being Rs. 50,000. The amount was borrowed under two promissory notes signed by both of them. On the face of the notes the liability of the executants is joint and several. It is admitted that each of the promissors took for himself on each occasion half of the amount borrowed, so that each owed the Bank Rs. 50,000. The insolvent owned 153 shares of the Indian Bank. Under Art. 19 of the Articles of Association, the Bank had a lien over these shares for the amounts due to it from the insolvent. The Indian Bank realised from the appellant the entire amount due to it from both the promissors. The entire money due to the Bank from himself and the insolvent having been paid off by him, the appellant contends that he is a

1. (1880) 6 A. C. 1. 2. (1852) 9 Hare, 809. 68 E. R 744: 89 R. R. 689.
4 (1807) 14 Ves. 160: 33 E. R. 482: 9 R. R. 264.
5. (1859) 3 De G. & J. 593: 44 E. R. 1397: 121 R. R. 238.
6. (1890) I. L. R. 15 Bom. 48.

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surety for the insolvent for the amount due from him and that he is entitled under S. 141 of the Indian Contract Act to the benefit of the security held by the Bank against the principal debtor, the insolvent, *i.e.*, in other words, he is entitled to have charge on the insolvent's shares in the Bank and the dividends accruing therefrom. The claim was opposed by the Official Assignee.

In the application in support of his claim, the appellant relied on two specific agreements of suretyship—one agreement each time the money was borrowed—alleged to have been entered into between himself and the insolvent. In his evidence he set up a general "custom" amongst the Nattukottai Chetties that in such borrowing transactions each borrower becomes surety for the amount taken by the other. The learned Judge held neither the "agreements" set up nor the "custom" was proved and so dismissed the petition.

On the evidence it is not seriously contended that the learned Judge's conclusions are incorrect. The evidence does not establish the agreements of guarantee set up nor does it support the alleged custom. Ss. 140 and 141 of the Indian Contract Act regulates as against the principal debtor the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. These sections are as follows:—

S. 140.—"Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

S. 141.—"A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

Section 140 lays down a general principle of which the most important practical application is to be found in S. 141 (*see* Pollock and Mulla, page 479). Under S. 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor. This was the section relied on by the appellant before Waller, J. If this section applies there can be no doubt that the appellant is entitled to claim a charge on the shares of the Bank held by it (the creditor) as a security against the insolvent. Having regard to the finding of the learned Judge and our opinion that the agreements set up by the appellant have not been proved, what is now urged is not

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that S. 141 of the Contract Act is directly applicable, but that the general principle of equity underlying that section would apply to the appellant who, though he is not a surety strictly speaking, occupies a position analogous to that of a surety; and since he has admittedly discharged the liability of the insolvent by paying the creditor his portion of the debt, viz., Rs. 50,000, he is in equity entitled to the benefit of the security held by the Bank, (the creditor), against the insolvent. This argument is sought to be supported by the decision in the well-known case of *Duncan, Fox & Co.* v. *North and South Wales Bank*[1]. It is doubtful if this argumant was put before the learned Judge but it is stated that the case was quoted before him. The question is purely one of law. It was held in that case that

> "The acceptoı of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of ıt who may afterwards pay it. The ındorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his ındorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suıetyship."

The facts of the case were these: R. & Sons offered a bill of exchange for a portion of the price due from them for a cargo of corn purchased from D. & Co. D. & Co. declined to take the bill of exchange. They were customers to N. S. W. Bank. One of the partners of R. & Sons had deposited with this Bank the title deeds of two of its own freehold properties and these were held by the Bank as securities for what the Bank might advance in the way of discounts. R. & Sons told D. & Co. that if they would inquire of the bankers they would find it would be alright with their bill. The Bank manager refused to discount the bill without the indorsement of D. & Co. but said that he believed D. & Co. would incur no more than a nominal liability by making the endorsement, placing the amount to the credit of D. & Co. R. & Sons later on stopped payment of the bill when it became due and the bill was dishonoured. D. & Co. then became acquainted with the fact that securities had been deposited with the bankers by R. & Sons to cover advances on their bills and brought an action against the bank to have the benefit, so far as they would go, of the securities deposited with them, claiming to be sureties to the bankers

1. (1880) 6 A. C. 1.

for what was due upon the bill. It was held that D. & Co. were sureties on their bill and that as such they were entitled to the benefit of these securities. (*See* the headnote.) In examining the principles and authorities applicable to the question to be decided the Lord Chancellor distinguished between three kinds of cases: (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two that *of one of those persons only, and not equally of both,* (the italics are mine) so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. In all these three kinds of cases it was pointed out by their Lordships that the person who discharges the liabilities due to the creditor would be entitled to the benefit of the security held by the creditor, though a case of suretyship strictly speaking would fall only under class I, as a contract of guarantee is confined to agreements where the 'surety' agrees with the creditor that he would discharge the liability of the 'principal debtor' in case of his default (*see* S. 126 of the Indian Contract Act). Obviously classes II and III are not cases of suretyship strictly so called. Their Lordships observed that the case before them did not fall within the first or the second class as admittedly there was no agreement either between R. & Sons and D. & Co. constituting the relation of principal and surety to which the Bank was a party, or a similar agreement between the two, to which the Bank was a stranger; and that the case fell within the third class in which though there is, strictly speaking, no contract of suretyship "there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other". It was for this reason that D. and Co. were held to have the rights of sureties though they were, strictly speaking, not sureties on the bill. In the case before us no contract between the appellant and the

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insolvent constituting the former a surety for the latter to which the Bank was a party, has been pleaded and the specific contracts of suretyship pleaded have not been substantiated. The appellant therefore argues that though he is not strictly speaking a surety, he falls within the third class enumerated above and that he occupies in equity a position analogous to that of a surety as mentioned therein as he has discharged the liability of the insolvent to the Bank. The question is whether he occupies this position. If he does, then he is, by extension of the principle applicable to the case of sureties strictly so called, entitled to the benefit of the security held by the Indian Bank. To fall within class III mentioned above and to assimilate his position with that of a surety strictly so called, a person who discharges the liability to the creditor should be only secondarily but not primarily liable to the creditor. This was the position of D. & Co. in *Duncan, Fox & Co.* v. *North and South Wales Bank*[1]. Having regard to the facts of the present case, it cannot be said that this is the position of the appellant with respect to his liability on the promissory notes. As already pointed out, the liability on the promissory notes of the appellant and the insolvent is joint and several. There is only one debt in the present case, a debt which is equally a debt of both the parties. The Indian Bank can recover the entire amount either from the appellant or from the insolvent. Thus there is no question of one person being primarily liable for the debt and the other only secondarily liable. In these circumstances the principle of the decision in *Duncan, Fox & Co.* v. *North and South Wales Bank*[1] has no application to the present case and on the strength of that decision the appellant cannot claim that his position is analogous to that of a surety and that therefore he is entitled to the benefit of the security held by the creditor.

Various other cases were cited by the appellant's learned counsel, but all of them are distinguishable. In the case in *William Rouse* v. *The Bradford Banking Company, Limited*[3] there was an express agreement between the parties. The case in *Craythorne* v. *Swinburne*[4] is one of co-sureties and the

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1. (1880) 6 A. C. 1.
3. (1894) A. C. 586.
4. (1807) 14 Ves. 160: 33 E. R. 482: 9 R. R. 264.

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cases in *Yonge* v. *Reynell*[2] and *Wythes* v. *Labouchere*[5] are all cases of strict suretyship. The case in *Goverdhandas Goculdas Tejpal* v. *The Bank of Bengal*[6] is also a case of a contract of suretyship. Reference was made to a passage in Sheldon on Subrogation, page 256, Chapter IV, S. 169, which shows that the right of subrogation between joint debtors exists in some States in America, but the existence of such rights is denied in some other States. However, no English decision has been cited in support of the contention that such right exists in England. In my opinion persons who are jointly and severally liable on promissory notes are not sureties under S. 126 of the Indian Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions of S. 141 of the Contract Act.

For the above reasons, I must hold that the appellant is not entitled to the benefit of the security held by the Indian Bank against the insolvent. I would therefore dismiss this appeal with costs.

S. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

The Official Assignee of Bombay .. *Appellant**

v.

K. R. P. Shroff and others .. *Respondents.*

P. C. — Official Assignee of Bombay *v.* Shroff.

Presidency Towns Insolvency Act (III of 1909), Ss.17 and 52 (2) (a)—Property of insolvent—Member of Bombay Native Share and Stock Brokers' Association—Insolvency of defaulting member—"Card" or right of membership, or the sale proceeds thereof—Right of the Official Assignee to.

Under the Rules of the Bombay Native Share and Stock Brokers' Association, the "card" (or right of membership) of a member who has been declared a defaulter, or the proceeds of sale of the card, do not, on his insolvency, vest in the Official Assignee for the benefit of the general body of his creditors. There is nothing contrary to the law of insolvency or to the provisions of S. 12 of the Transfer of Property Act in the Rules of the Association providing that as and upon the declaration of default, the

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*P. C. Appeal No. 56 of 1931. 6th May, 1932.

2. (1852) 9 Hare, 809: 68 E. R. 744: 89 R. R. 689.

5. (1859) 3 De G. & J. 593: 44 E. R. 1397: 121 R. R. 238.

6, (1890) I. L. R. 15 Bom. 48.

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defaulting member's right and interest in the Association (whether in respect of his card or otherwise) shall be extinguished and come to an end.

Judgment of the High Court, Bombay (I. L. R. 55 Bom. 623), affirmed.

Appeal No. 56 of 1931 from a decree of the High Court, Bombay, dated the 30th September, 1930, on its Appellate Side, affirming a decree of the same Court, on its Original Side, dated the 19th March, 1930.

The principal question in the appeal was whether a card or right of membership of the Bombay Native Share and Stock Brokers' Association, formerly held by one Virji Madhavji, vested together with all the rights and benefits annexed thereto on the insolvency of the said Virji Madhavji in the appellant as the assignee in insolvency of his estate and effects. Both Courts in India decided that the said card or right of membership and the rights and benefits annexed thereto did not so vest.

The relevant Rules of the Association are set out fully in their Lordships' judgment.

De Gruyther, K. C. (with *W. N. Stable*) for appellant.—The card or the proceeds of sale thereof vested in the appellant (Official Assignee) for distribution among the creditors of the insolvent generally. The Rules of the Association providing for distribution among the Exchange creditors to the exclusion of the general body of creditors are contrary to the policy of the bankruptcy law and to the provisions of S. 12 of the Transfer of Property Act.

Whitmore v. *Mason*[1], *Tomkins* v. *Saffery*[2], Ex parte *Grant*, In re *Plumbly*[3] and *Borland's Trustee* v. *Steel Brothers & Co.*[4] referred to and discussed.

[LORD TOMLIN.—Everything that has happened here has been provided for in the Rules. On a member becoming a defaulter, his interest in the Association is cancelled. You must show that the Rules are bad in law and that the property vests in you as the Official Assignee.]

A condition providing for defeasance on bankruptcy would be a fraud on the bankruptcy laws.

[LORD TOMLIN.—The Rules simply provide that if a member loses his membership, the Association should make good the loss to the other members of the Association, by selling his card and paying them out of the proceeds. What is wrong in that?]

Upjohn, K. C. (with *K. Preedy*) for respondents.—Any rights or privileges which Virji Madhavji enjoyed by reason of his membership in the Association were personal and incapable of assignment or transfer by him. He had no rights which could vest

1. (1861) 2 J. & H. 204: 70 E. R. 1031.
2. (1877) 3 A. C. 213.
3. (1880) 13 Ch. D. 667.
4. (1901) 1 Ch. 279.

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on his insolvency in the Official Assignee. In any event, his rights were forfeited on his being declared a defaulter under the Rules, which, it is submitted, do not contravene the provisions of S. 12 of the Transfer of Property Act.

De Gruyther, K. C., replied.

6th May, 1932. Their Lordships' judgment was delivered by

Lord Blanesburgh

Lord Blanesburgh.—This is an appeal from a decree of the High Court at Bombay of the 30th September, 1930, made in its Appellate Jurisdiction, dismissing an appeal of the appellant from a decree of the same Court of the 19th March, 1930, made in its Original Civil Jurisdiction. The main question for determination is whether a card or right of membership of one Virji Madhavji in the Bombay Native Share and Stock Brokers' Association or the proceeds of sale thereof, when sold, pass to the appellant as the assignee in insolvency of his estate and effects.

By both Courts in India the question has been answered in the negative.

The facts of the case are simple and are not in dispute. On or about the 26th November, 1910, the insolvent was, on his own application, admitted a member of the Association in the place of his deceased father. On the 11th May, 1917, a card was issued to him, certifying, that as such member, enrolled in 1910, he was entitled to enjoy all the rights and privileges and was subject to all the liabilities of membership according to the rules and regulations of the Association. Being successor to his father he was not, on his enrolment as a member, required to pay any entrance fee, but in every year until he was declared a defaulter as presently to be mentioned he paid to the Association a subscription of Rs. 5, and in the receipt given him on the occasion of each payment he is described as " a registered broker in the Sir Dinshaw Petit Native Share Brokers' Hall". He remained a member of the Association until the 23rd June, 1925. On that day, following a notification to the Association of the 13th June that he was unable to meet his liabilities, he was, under the rules, declared a defaulter and his card or right of membership was forfeited by the Directors. On the 2nd July, 1925, he was adjudicated an insolvent under the Presidency Towns Insolvency Act, 1909. Thereupon by virtue of Ss. 17 and

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52 of the Act all his property wherever situated which might belong to or be vested in him at the commencement of the insolvency (with certain exceptions not presently material) vested in the Official Assignee and became divisible among his creditors. Virji Madhavji's insolvency in fact commenced, at the latest, on the 13th June, 1925, the date of his notification to the Association already referred to, that is to say, some days before the forfeiture of his membership of the Association had become effective.

More than three years later, on the 9th October, 1928, the appellant as assignee in his insolvency commenced the suit out of which this appeal arises claiming against the respondents sued as representing the Association a declaration that the card of the insolvent and all rights and benefits annexed thereto were vested in him, the appellant, and that he was entitled to the net proceeds of their sale. He claimed also that the respondents might be ordered to effect such sale and to hand over the proceeds to the appellant for distribution amongst the creditors of the insolvent.

At all times material to these claims of the appellant, the relations between the Association and its members were regulated by a deed of Association, dated the 3rd December, 1887, and by rules subsequently made and adopted pursuant to its provisions. In a less formal shape the Association had been in existence for some years before. Recitals in the deed of 1887 show that in 1875 some native brokers doing brokerage business in shares and stocks had formed in Bombay an association for protecting the character, status and interest of native share and stock brokers, and for providing a hall or building for the use of the members of the Association: that ever since these brokers had been associated as a brokers' association, and that having become possessed of certain moneys they had resolved formally to establish and form themselves into a society to be called the Native Share and Stock Brokers' Association. The deed of 1887 was to accomplish that purpose. All the existing members of the Association in person or by representation were parties to it of the first part. By them at a meeting at the Brokers' Hall of the previous 5th of February the parties of the second part had been appointed the Managing Committee of the Association and those of the third part its trustees.

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By the deed, made operative as one of mutual covenants between its signatories, it was amongst other things provided that the parties of the first part and such other persons as had already been and as should thereafter be appointed and admitted members should thenceforth constitute and be a society to be called the Native Share and Stock Brokers' Association.

The first stated purpose of the Association was:

"To support and protect the character, status and interests of brokers dealing in shares, stock and other like securities in Bombay, to promote honourable practice, to suppress malpractices, to settle disputes amongst brokers, to decide all questions of usage or courtesy in conducting brokerage business."

The second purpose was to erect and maintain at Bombay a suitable building for use by the Association as a Brokers' Hall to be called "Sir Dinshaw Petit Native Brokers' Exchange Hall".

A third purpose was to purchase or otherwise acquire any real property and any rights or privileges necessary or convenient for the purposes of the Association, elaborate provision being made for vesting the property of the Association in Trustees.

None but natives of India were to be admitted as members of the Association (cl. 2): any person who was a native of India might with the assent of the Managing Committee become a member (cl. 3) but any application for membership might be rejected by the Managing Committee without assigning any reason (cl. 6). Any member of the Association might withdraw therefrom on two months' notice at the expiration of which he would cease to be a member (cl. 11) but any person ceasing for any reason to be a member was nevertheless to be liable for and must pay all moneys then due from him to the Association (cl. 13). Upon the Managing Committee, amongst other wide powers, was conferred the power of "framing and altering Bye-laws and Rules from time to time for the guidance of the members" (cl. 21), while by cl. 26 a general meeting of the members was given power "to ordain and make such and so many rules and orders although they may have the effect of altering the clauses and provisions of these presents as to them or the major part of them shall seem necessary for," *inter alia*, "carrying the objects and purposes of the said Association into full and complete effect and such rules and orders or any of them from time to time to alter, change or annul".

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One clause of the deed, and certain "rules and orders" subsequently ordained by general meetings of the Association their Lordships now set forth textually as being more or less directly germane to the question at issue on this appeal.

DEED.

"Section XII.—That the rights and privileges of a member during his lifetime shall be enjoyed by his sons without any payment of entrance fee or the annual subscription but otherwise shall be personal and incapable of transfer by the act of such member or by operation of law, those of a firm shall cease upon its dissolution and those of an individual member on his death."

RULES.

"3. No person, without holding . . . a card, shall be allowed to enter the hall and the business.

"4. For admission into the hall, each person shall be charged a fee of Rs. 1000, and a member thus admitted shall have to pay an annual subscription of Rs. 5.

"5. The Board of Directors has power to enhance or reduce the admission fee and the annual subscription from time to time according to the circumstances.

"8. A member who is admitted as above, shall act according to the rules and regulations of the hall and if it is proved that he is guilty of misconduct of any sort, the Board of Directors have power to strike off his name from the list of certified brokers of the hall. Besides this, his admission fee also shall be forfeited.

DISPOSAL OF THE DECEASED BROKER'S CARD.

"13. On the death of a certified broker his card shall pass to his son, and no fee will have to be paid on that account.

"15. If the deceased broker has no issue, the card shall be sold to the person to whom the widow or the executor of the deceased directs (it to be sold). . . .

"16. DIRECTOR.—Only after obtaining the assent of the Board, shall the card be transferred as above to a particular individual, and the director shall disallow any such application without giving any reason.

"17. If there is no such relative of the deceased broker, who can carry on his business, his card shall be sold according to the practice of the Association and the sale proceeds thereof shall be paid to his widow or to any one else (who is) his lawful heir.

DISPOSAL OF AN INSOLVENT BROKER'S CARD.

"18. If any of the brokers goes away from the market without paying the monies claimable by another certified broker or is unable to pay (the same), his card shall be sold and the sale proceeds thereof shall be distributed amongst his creditors.

"19. If any deceased broker is indebted to any of the certified brokers the directors shall settle such debt and shall pay whatever amount they want to pay from the sale proceeds of the card of the deceased, and the balance, whatever it be, shall be paid to his lawful heir.

"21. If any broker does not pay the subscription in respect of his card for two consecutive years, his name shall be struck off the roll of members, his card shall be forfeited. . . .

CONDUCT OF BROKERS.

"22. If the card of any broker has been forfeited for any reason whatever, no certified broker shall deal with him in any way, and if any broker will be found so dealing with him, his card also shall be forfeited.

"56. If a member fails to pay the annual subscription

or

K. goes away from the Association's Hall

or

Kh. If the Directors deprive any member of his rights for his having failed as a member broker of the Association to pay the amount due to any other member broker of the Association in respect of share and stock business, then after such a thing is notified and after his name is published by order of the Directors as that of a defaulter that broker shall cease to derive any benefit as a member of the Association and the amount paid by him as entrance fee to the Association shall be forfeited.

"57. In addition to their inherent powers the Directors shall have, free from anybody's right of raising any question in that behalf, the following powers (*i.e*) . . . to sell . . . the right appertaining to the vacancy thus created and to distribute in such manner as the Directors may deem proper the amount which may be realized from the purchase of the right of the member who may have been declared a defaulter as stated above, among such members of the Association who may be declared to be the creditors of that defaulter and the defaulting member shall have no right to challenge this power possessed by them.

"62. On account of his having become a defaulter his card shall be cancelled in accordance with the rules of the Association. If he fails to pay in full his creditors within a period of six months then his card shall be sold and the amount realized on the sale thereof shall be distributed among his creditors in proportion (to their claims) and if on such distribution being made any balance remains over then the same shall remain credited to the account of the fund in respect of the hall."

RESOLUTION OF 17TH NOVEMBER, 1924.

"If a member who has continued to be a member for a period of not less than 25 years, desires to tender his resignation and intends to have his nominee enrolled as a member in his stead and applies in writing to the Board accordingly, the Board can, if it deems proper under the absolute discretion vested in it, enroll the aforesaid nominee (as a member) in the place of the said member without charging any entrance fees . . .

"The Board shall not enroll any such nominee as a member unless and until in connection with the said matter, the said nominee is fit in all respects to become a member according to the rules and regulations governing the exchange at that time, and the said proposed nominee has been selected by the Board itself.

"From what has been hereinabove stated it is not to be thought that (it) confers upon any member the right to transfer his card to the name of any other person or that (it) gives any transferable interest to any member in his card."

Their Lordships have made this full survey of the salient provisions of the constitution deed and rules of the Association in order that its real nature and the status of its members might thereby be disclosed. So much is essential, if the claims of the appellant are to be dealt with according to law. And in the result certain things, they think, have become clear.

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First, as to the nature of the Association in point of law. It is of course not a company. Nor is it a partnership: it is not formed for profit of its members as associates in business. It is merely a voluntary association, resembling a members' club, perhaps, more closely than anything else. It has been formed in order that its members, share and stock brokers by profession, admitted for their character and position, might have for their use a Hall for the transaction of their business with one another according to honourable practice. The transactions of the members *inter se* are for the benefit or burden of the several participants and of them only. With bargains between members, as such, neither the Association at large nor the other members are concerned.

Now if such an organisation is to attain its ends membership must plainly be a personal thing, incapable of uncontrolled transfer: expulsion from membership must normally follow default or misconduct: upon expulsion all interest of the defaulting member in the property of the organization must cease. For all these things—characteristic necessities *mutatis mutandis* for provision by the rules of any members' club—most careful provision, as will have been seen, is made in the case of this Association.

It may not, of course, be said that the members of the Association, so long as they remain members, are not interested in its Hall and other property. On the contrary that Hall and property is theirs collectively although held, on their account, for the purposes of the Association and with no right in any member or any majority of members to have any realisation for individual benefit. Only if and when all the members have agreed to put an end to the Association will they, after its debts have been satisfied, be entitled to have a division amongst themselves of what remains. See *Baird* v. *Wells*[1]. It may well be that the remoteness of the individual interest possessed by any member in the property of such an association is the effective reason why forfeiture or abandonment of all interest therein naturally follows expulsion, resignation or death and why no trustee in bankruptcy seems so far to have been courageous enough in any case like the present to put forward a claim analogous to that made by the appellant in these proceedings.

1. (1890) 44 Ch. D. 661 at 675.

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That claim, now that it is put forward, is rested on two quite separate grounds. First of all the appellant bases it, as their Lordships understand, on the rules of the Association, according to what he submits is their true construction. That ground failing, he relies, secondly, despite all rules, upon his paramount rights as assignee in insolvency.

Upon the first of these grounds their Lordships are unable to see how under the rules the appellant's claim can be maintained. He does not challenge the regularity of the forfeiture of the insolvent's right of membership nor does he dispute that under the rules the declaration of default was fully justified. That being so, it cannot, in their Lordships' judgment, be questioned that thereupon the insolvent's interest in the Association, whether in respect of his card or otherwise, became, under the rules, extinguished. So soon as membership ceases whether on resignation, death, as a result of misconduct or for non-payment of his subscription all the interest of the member in the property of the Association is under the rules at an end. This is made clear, in case of resignation or death by clauses 11, 12 and 13 of the deed: in case of misconduct by R. 8: and in case of exclusion for non-payment of his subscription by R. 21: and again in the last two cases by R. 56. In relation to his card, which is a thing separate altogether from the property of the Association, certain rights are reserved to a member or his representatives on death or retirement. On death it may pass to his son, under R. 13: and if he has no son, then the Association, waiving the privilege of admitting a new member on payment of an entrance fee to itself under R. 4, finds a successor to the deceased in a purchaser of his card for a price to be handed to his widow or executor under R. 15 or, in the circumstances of R. 17, to his lawful heir. And their Lordships do not doubt that these rights in the representatives of the deceased are enforceable rights, as after 25 years' membership are the rights of the member himself under the resolution of the 17th November, 1924. See *Baird* v. *Wells*[1].

But, although the rules are badly drawn and not in uniform phraseology their result in the case of a member who has lost his membership for being a defaulter clearly enough is that he loses all interest both in the property of the Association and in his card. In such a case no interest is reserved in the defaulter's

1. (1890) 44 Ch. D. 661.

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card except to members of the Association who have suffered by his lapse—in the rules sometimes called his creditors—or to the Association itself. This seems to their Lordships to be the result of Rr. 18, 56, 57 and 62. The defaulting member himself has no interest in the result of the sale provided for under these rules nor can he require a sale to be made. The rules are there for the benefit of his "exchange creditors" and are doubtless enforceable at their instance. In this case the learned Trial Judge was of opinion that R. 62 was enforceable by the appellant and he directed the sale of the insolvent's card and the application of the proceeds as by that rule prescribed. There has been no appeal by the respondents against that part of the order and therefore as against them it must stand. But it must not be supposed that their Lordships think it justified. In their view, so far as the appellant's case was one under the rules, his suit ought to have been dismissed.

Nor does it appear to their Lordships that his second or alternative ground of claim has any higher warrant. That claim amounts to this that, if the effect of the rules be that the proceeds of sale of the insolvent's card do not enure for the benefit of the general body of his creditors the rules are contrary to the law of insolvency and, separately, to the provisions of S. 12 of the Transfer of Property Act, 1882, which, it will be recalled, is as follows:—

"Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void."

The appellant sought to justify his position here by quoting *Borland's Trustee* v. *Steel Brothers & Co., Limited*[2] in reference to a company, and *Whitmore* v. *Mason*[3] in reference to a partnership, and by insisting upon the restricted permissible operation of forfeiture provisions in such cases. It being agreed however on all hands that the rules of this Association are entirely innocent of any design to evade the law of insolvency it may be that even these cases, although cases of a company and a partnership, are more favourable to the respondents than to the appellant. The case of In re *Plumbly*[4], a Stock Exchange case, is more germane to the present and is the

2. (1901) 1 Ch. 279. 3. (1861) 2 J. & H 234: 70 E. R. 1031.
4. (1880) 13 Ch. D. 667.

P. C.

Official Assignee of Bombay v. Shroff.

Lord Blanesburgh

case relied upon in the Indian Courts. There a rule of the London Stock Exchange was upheld against a trustee in bankruptcy although the result was to withdraw from the bankruptcy in favour of exchange creditors sums actually due to the bankrupt on exchange transactions. And no such extreme claim against the assignee is here involved.

But their Lordships find the real answer to this contention of the appellant in the nature and character of the Association as they have described it whereby in the case of a defaulting member who is expelled from the Association no interest in his card remains in himself and none that can pass to his assignee whether his expulsion does or does not take place prior to the commencement of his insolvency.

As to S. 12 of the Transfer of Property Act their Lordships have been unable to see that it has any application to the card of a member of this Association. When the nature of the interest acquired by him upon admission to the Association is considered—and this has already been expounded in an earlier portion of this judgment—it is difficult to see how the assumption of membership involves at any stage the transfer of any property on any condition whatever. It is impossible, in their Lordships' judgment, to describe the insolvent's status of membership of the Association in language which, however tortured, could bring it within the terms of the section.

On the whole, their Lordships' conclusion, so far as the case remains open for them to deal with, is that reached by both Courts in India, and in their judgment the appeal fails.

Their Lordships will accordingly humbly advise His Majesty that it be dismissed. And with costs.

Solicitors for appellant: *Lattey and Dawe.*

Solicitors for respondents: *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CORNISH.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

V. T. S. Sevuga Pandia Thevar .. *Respondent.*

F. B.
——
The Commissioner of Income-tax, Madras
v.
Sevuga Pandia Thevar.

Income-tax Act (XI of 1922), Ss. 2 (1), 4 (3) (viii)—Madras Regulation (XXV of 1802), Ss. 1 and 4—Sanad granted to Zamindar under it—Whether Zamindar assured against any future general taxation of incomes—Income derived by Zamindar from fisheries—Whether agricultural income—Madras Estates Land Act (I of 1908), S. 3 (11) (b)—Scope of.

Where income derived by a Zamindar from the lease of the right to fish in a number of tanks and connected supply channels in the Zamindari the water in which was used for agricultural purposes, was assessed to income-tax and it was contended that income from the fisheries was exempt from the assessment to income-tax on the grounds that they were not so assessable under the terms of the sanad granted to the Zamindar and that the said income was agricultural income especially in view of the definition of rent in S. 3 (11) (*b*) of the Madras Estates Land Act,

Held, (1) that following the Privy Council ruling in *Probhat Chandra Barua* v. *King-Emperor*, (1930) L. R. 57 I. A. 228: I. L. R. 58 C. 430: 59 M. L. J. 814 (P. C.) it must be held that the inclusion of income from fisheries in the assets of the Zamindari in fixing the peishkush was by itself no ground for claiming exemption from assessment under the Indian Income-tax Act.

(2) The right to fishery may be an interest in the immoveable property but that does not lead to the conclusion that income from leasing the right to catch fish in a tank is agricultural income within the meaning of the Income-tax Act.

Emperor v *Probhat Chandra Barua*, (1924) I. L. R. 51 Cal. 504, *Emperor* v. *Probhat Chandra Barua*, (1927) I. L. R. 54 Cal. 863 (F. B.) and *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*, (1924) I. L. R. 3 Pat. 470, referred to.

Section 3 (11) (*b*) of the Madras Estates Land Act cannot assist the petitioner because it only extends the procedure prescribed in the said Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as "the Act").

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*O. P. No. 33 of 1932. 11th May, 1932.

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The petitioner is the Zamindar of Seithur deriving his title to the Zamin from the sanad issued to him by the Government under the Madras Permanent Settlement Regulation (XXV of 1802). He is a resident of Seithur within the jurisdiction of the Income-tax Officer, Virudhunagar Circle.

The case arises out of the inclusion in the assessment made on the petitioner for 1929-30 of a sum of Rs. 6,956 This income is derived by the petitioner from the lease of the right to fish in a number of tanks and connected supply channels in the Zamindari the water in which is used for agricultural purposes. Excepting the right to fish the lessees have no other rights whatsoever in the water of the tanks and channels; nor have they any right over the bed of the tanks and channels. A translation of a specimen lease deed is filed, marked Ex. A. The petitioner claimed that under the terms of the Madras Permanent Settlement Regulation, XXV of 1802 and the sanad granted to him thereunder a translation of the relevant portion of which is filed, marked Ex. B, he was exempt from tax in respect of any income derived by him from the Zamindari and therefore objected to the assessment of this income. The Income-tax Officer overruled his objections.

The petitioner appealed to the Assistant Commissioner but without success.

The petitioner now requires me to refer to the High Court the following question of law which I accordingly refer:—

Question.—Whether the income from the fisheries is exempt from the assessment from income-tax on the grounds that they are not so assessable under the terms of the sanad granted to the Zamindar of Seithur and of Ss. 1 and 4 of the Madras Regulation XXV of 1802 and on the ground that the said income is agricultural income especially in view of the definition of rent in S. 3 (11) (*b*) of the Madras Estates Land Act.

The contention underlying the first part of the question is that the peishkush in respect of the Zamin was fixed at the time of the Permanent Settlement in commutation not only of the rentals of the cultivated lands but also of the rentals from fisheries, and that the Madras Permanent Settlement Regulation, XXV of 1802 and the sanad granted to the Zamindar thereunder are a bar to any further taxation of the income from his Zamindari. This contention cannot in my opinion hold good because the Privy Council has held in *Raja Probhat Chandra Barua* v. *King-Emperor*[1] a case arising under the Bengal Permanent Settlement Regulations (I of 1793 and others) that "while the Regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the Zamindari income, they contain no promise that a Zamindar shall in respect of the income which he

1. (1930) L. R. 57 I. A. 228: I. L. R. 58 C. 430: 59 M. L. J. 814 (P. C.).

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derives from his Zamindari be exempt from liability to any future general scheme of property taxation, or that the income of the Zamindari shall not be subjected with other incomes to any future general taxation of income". It is however argued by the petitioner that there is no provision in the Bengal Permanent Settlement Regulations (I of 1793 and others) corresponding to S. 4 of the Madras Permanent Settlement Regulation, XXV of 1802 and that the ruling of the Privy Council referred to above which was based on a consideration of the Bengal Regulations cannot therefore apply to this case. I am of opinion that the assurances given in S. 1 of the Madras Permanent Settlement Regulation and Art. VI of the Bengal Permanent Settlement Regulation, I of 1793, are in substance one and the same, that S. 4 of the Madras Permanent Settlement Regulation does not introduce any substantial difference in this respect and that therefore the petitioner's case is governed by the decision of the Privy Council referred to above.

The second part of the question raises a contention that the income is "agricultural income" within the meaning of the definition in S. 2 (1) of the Indian Income-tax Act. Put more specifically, the claim is that this is "rent or revenue derived from land which is used for agricultural purposes". The points taken are:

(1) that under S. 3 (11) (*b*) of the Madras Estates Land Act (I of 1908) the term "rent" includes rent from fisheries,

(2) that land includes water standing on it, and

(3) that since the water is used for agricultural purposes the income from fisheries is income derived from agriculture.

The provision in the Madras Estates Land Act relied upon by the petitioner cannot help him because it only extends the procedure prescribed in the said Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. So far from helping the petitioner the provision only emphasises the difference between revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section.

The argument that "land includes water" appears to rest on a judgment of the Patna High Court reported in *Jaigobind Singh* v. *Bhawani Singh*[1]. I take that judgment to be authority for the view that a right to the use of land includes the right to fish in water lying on the land, unless the fishery rights are expressly reserved. There is nothing in this to indicate or imply that revenue derived from the fishery must be deemed to be revenue derived from

1. (1929) I. L. R. 9 Pat. 401.

land. In this case the bed of the tanks and channels used for the fishery was not leased out at all. What was leased out was the specific right to fish in tanks and channels belonging to the Zamindar. From these facts it follows that the revenue in question was not derived from the land. The fact that the water which furnished the revenue may have been subsequently used for irrigation appears to be irrelevant.

S. Srinivasa Aiyangar and *A. Swaminatha Aiyar* for petitioner (Assessee).

M. Patanjali Sastri for respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—At the request of the petitioner the Commissioner of Income-tax has referred the following question of law to the High Court, *viz.*: Beasley, C.J.

"Whether the income from the fisheries is exempt from the assessment from income-tax on the grounds that they are not so assessable under the terms of the sanad granted to the Zamindar of Seithur and of Ss. 1 and 4 of the Madras Regulation XXV of 1802 and on the ground that the said income is agricultural income especially in view of the definition of rent in S. 3 (11) (*b*) of the Madras Estates Land Act."

The facts of the case are that in the assessment made on the petitioner for 1929-1930 a sum of Rs. 6,956 was included. This was income derived by the petitioner from the lease of the right to fish in a number of tanks and connected supply channels in the Zamindari the water in which is used for agricultural purposes. Excepting the right to fish, the lessees have no other rights whatsoever in the water of the tanks and channels nor have they any right over the bed of the tanks and channels. The land on which the tanks are and through which the channels run is agricultural land and assessed to land revenue in British India. It will be seen from the question referred to us that exemption is claimed for the income on two grounds, but Mr. S. Srinivasa Aiyangar for the petitioner stated that he was not prepared to argue that the income was exempt for the former reason stated in the question because he was unable to argue that there was any real difference between the Madras Regulation XXV of 1802 and the Bengal Regulations which were relied upon for a claim to exemption of Zamindari income, a claim which was negatived by a Full Bench of the Calcutta High Court in *Emperor* v. *Probhat Chandra Barua*[1]. On appeal to the Privy Council this decision was affirmed

1. (1927) I. L. R. 54 C. 863 (F. B.).

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in *Probhat Chandra Barua* v. *King-Emperor*[1]. Mr. S. Srinivasa Aiyangar accordingly directed his argument to the latter ground for exemption raised in the question referred. It would appear that even this question is determined by the decision of the Privy Council in *Probhat Chandra Barua* v. *King-Emperor*[1]. One of the questions submitted for the decision of the Calcutta High Court in *Emperor* v. *Probhat Chandra Barua*[2] was whether *jalkars* or rents received from fisheries was agricultural income and therefore exempted from assessment to income-tax by S. 4 (3) (*viii*) of the Act. It was held by the Calcutta High Court that that income was not agricultural income as defined by S. 2 (1) so as to exempt from tax under S. 4 (3) (*viii*) and that decision, as already stated, was affirmed by the Privy Council. But that point does not appear to have been seriously argued because Lord Russell of Killowen in delivering the judgment of their Lordships' Board says at p. 448:

"Question 1 was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or reasons which would justify them in suggesting that any of the 10 specified items could properly be described as agricultural income within the definition of agricultural income contained in S. 2 (1) of the Indian Income-tax Act, 1922. Their Lordships accordingly agree with the negative answer which has been given to Question 1."

It is not clear what the fisheries were from which the income in that case was derived by the Zamindar, whether fishery rights were over streams running through the Zamindari property or rivers or whether the right to fish was, as in this case, in tanks and channels used for irrigation purposes. All that we know is that it was income derived from fisheries and we are left in doubt as to whether the Privy Council had under consideration the same facts as there are here with regard to fishery rights.

The question for our determination here is whether this is agricultural income. Agricultural income is defined in S. 2 of the Act as

"(*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such."

We are not concerned with any other definition of agricultural income appearing in this section as it is conceded by the

1. (1930) L. R. 57 I. A. 228: I. L. R. 58 C. 430: 59 M. L. J. 814 (P. C.).
2. (1927) I. L.R. 54 C. 863 (F. B.).

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petitioner that, if this income is not income as defined in S. 2 (1) (*a*), it is assessable to income-tax. It is argued that land includes the water standing on it and that, as the land surrounding the tanks and through which the channels run is agricultural land or land used for agricultural purposes and the water is used for agricultural purposes, namely, to irrigate the land used for agriculture, the income from the fisheries is income derived from agriculture. It is not suggested by the petitioner that the beds of the tanks and channels are ever used for agricultural purposes. In fact we do not gather that the tanks or the channels are ever dry although I do not for one moment think that that question is of any importance in view of the beforementioned admission by the petitioner. No authority in support of this argument has been referred to and there does not appear to be any case in which income from fishery rights has been held to be agricultural income. But there are decisions to the contrary. In *Emperor* v. *Probhat Chandra Barua*[1] it was held by Rankin and Page, JJ., that income from fisheries, that is to say, income derived from the rental of fisheries, is not agricultural income or income derived from land used for agricultural purposes. At page 524 Rankin, J., says:

"It remains to consider the Assessee's claim to exemption as a claim to come within the provisions of S. 2 of the Act. In my opinion, income derived from a fishery is not 'rent or revenue derived from land which is used for agricultural purposes'. Learned counsel for the Assessee has suggested that land used for agricultural purposes becomes at certain seasons flooded, and that in *bhils* and *dobas* thus formed over such land there may be rights of fishing of some value. Any such case will require careful consideration on its own facts. If the argument is that the income in such a case is 'derived from land which is used for agricultural purposes' although it is not derived from any such use, it may be observed that the decision in the *mela* case [*Umed Rasul Shaha Fakir* v. *Anath Bandhu Chaudhuri*[2]] is some authority the other way."

Again in the Full Bench case reported in *Emperor* v. *Probhat Chandra Barua*[3] it was decided by the Calcutta High Court that such income is not agricultural income. It was also so held in *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*[4] by Dawson Miller, C. J., and Mullick, J. At page 485 Dawson Miller, C. J., says:

"The popular conception of agriculture, even if it should include the rearing of live stock and poultry fed on the produce of the land and requiring in certain cases cultivation of the land for grazing purposes, or otherwise, seems hardly wide enough to include the rearing of fish in rivers or tanks"

1. (1924) I. L. R. 51 C. 504.
2. (1901) I. L. R. 28 C. 637.
3. (1927) I.L.R. 54 C. 863 (F. B.).
4. (1924) I. L. R. 3 Pat. 470.

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and

> "Nor does it seem reasonable to hold that income derived from fishing over land covered by water and which is not used for any agricultural purpose is income derived from agriculture. Fish are not the prodnce of the land. Their natural element is the water and their cultivation and welfare depend in no sense upon agriculture. It may be that in certain cases the *jalkar* rights include the right to cultivate the soil of the tank when dry but the facts of this case do not show that the income sought to be exempted from tax was other than that derived from the right to catch fish"

I am unable to agree with Mr. Srinivasa Aiyangar's contention that this is revenue derived from land which is used for agricultural purposes. The fact that some of the water in the tanks or channels is used for agricultural purposes does not make this income revenue derived from land which is used for agricultural purposes. The land upon which the water is is not being used for agricultural purposes and whilst the water is there cannot be used for agricultural purposes and there is no evidence here to show that the land is ever or has ever been used for agricultural purposes; nor do I think that any assistance to the petitioner is to be derived from the use of the word "revenue" in sub-section (*a*) to S. 2 (1). It is argued that, as both "rent" and "revenue" are used in that sub-section, "revenue" means something different from the rent derived by the landowner from land used for agricultural purposes and must be taken to include all other sources of income derivable in different ways to that by which the rent is derived, that is to say, to include all income which is got from anything of value which may be upon land used for agricultural purposes. It is even contended that, if valuable stones are to be found on the surface of land being used for agricultural purposes, the income derived from the sale of them would be agricultural income. I think that the petitioner's argument must extend to that length and I cannot agree with it.

With regard to another argument put forward, namely, that as the term "rent" in S. 3 (11) (*b*) of the Madras Estates Land Act includes rent from fisheries this must be taken to be agricultural income, it seems to me that that provision of the Act cannot assist the petitioner because it only extends the procedure prescribed in the said Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. I agree with the observations of Dawson Miller, C.J., in *Maharajadhiraj of Darbhanga* v. *Commissioner*

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of Income-tax[1] in dealing with a similar argument based upon S. 193 of the Bengal Tenancy Act that so far from helping the petitioner the provision only emphasises the difference between the revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section.

In my view, the question referred to us must be answered in the negative. Costs Rs. 250 to the Commissioner of Income-tax.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—Under S. 66 (2) of the Indian Income-tax Act (XI of 1922) the Commissioner of Income-tax, Madras, has referred for the decision of the High Court the following question:—

"Whether the income from the fisheries is exempt from the assessment from income-tax on the grounds that they are not so assessable under the terms of the sanad granted to the Zamindar of Seithur and of Ss. 1 and 4 of the Madras Regulation XXV of 1802 and on the ground that the said income is agricultural income especially in view of the definition of rent in S. 3 (11) (*b*) of the Madras Estates Land Act."

The assessee is the Zamindar of Seithur, tracing his title to the Zamindari to a sanad issued to his predecessors, by the Government under the Madras Permanent Settlement Regulation (XXV of 1802). In calculating the peishkush fixed on the Zamindari, income from fisheries also seems to have been taken into account. During the year of assessment, the assessee derived an income of Rs. 6,956 by leasing out the right to fish in a number of tanks and connected supply channels in the Zamindari, the water in which is used for agricultural purposes. Exemption was claimed by the assessee on two grounds:

1. That the income from fisheries was included in the assets of the Zamindari for fixing peishkush payable by the Zamindar to the Government, and that he could not be required to pay income-tax on any of the items of income included in the assets of the Zamindari with reference to which peishkush was fixed—since it would be a case of double taxation, which, it was contended, would be illegal; and

2. That income derived by leasing the right to fish in the tanks and connected supply channels in the Zamindari is agricultural income, and as such is exempted under S. 4 (3) (*viii*) of the Act.

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1. (1924) I. L. R. 3 Pat. 470.

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After the decision of the Privy Council in the case reported in *Probhat Chandra Barua* v. *King-Emperor*[1] the first contention is not tenable. With reference to a similar contention based on substantially (for the present purpose) similar provisions of the Bengal Permanent Settlement Regulation (I of 1793), the Privy Council held that "while the Regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the Zamindari income, they contain no promise that a Zamindar shall in respect of the income which he derives from his Zamindari be exempt from liability to any future general scheme of property taxation, or that the income of the Zamindari shall not be subjected with other incomes to any future general taxation of incomes".

Their Lordships agreed with the view expressed by Ghose, J., in the following passage in his judgment:—

> "There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are Zamindars with whom the Permanent Settlement was concluded or not."

In these circumstances, the first contention raised on behalf of the assessee should be disallowed.

I may state that Mr. S. Srinivasa Aiyangar, the learned advocate who appeared for the assessee, did not really seriously argue this point, having regard to the recent Privy Council case mentioned above, which settled the controversy on a point on which there was difference of opinion among various learned Judges of the several High Courts in India. As the Privy Council remarked in the course of the judgment in the above case, as many as 13 learned Judges of the High Courts in India had occasion to consider this question, five being of the opinion which was finally accepted by the Privy Council, while eight were of a different opinion. The question being now concluded by the decision of the Privy Council, it must be held that the inclusion of income from fisheries in the assets of the Zamindari in fixing the peishkush is by itself no ground for claiming exemption from assessment under the Indian Income-tax Act.

The second contention which was in fact the only point that was really argued before us was based on the provision of Ss. 2 and 3 of the Indian Income-tax Act. It was argued that income derived by leasing the right to fish in the tanks and connected

1. (1930) L. R. 57 I. A. 228. I. L. R. 58 C. 430: 59 M. L. J. 814 (P. C.).

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supply channels in the Zamindari is "agricultural income" within the meaning of S. 2 (1) of the Act. If it is "agricultural income" then under S. 4 (3) (*viii*) the act would not apply to such income. The only question therefore is whether such income is "agricultural income". S. 4 (1) enacts :

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived."

Sub-section (3) constitutes an exception, and any person claiming the benefit of an exception should strictly prove that his case comes within the exception. Agricultural income is defined in S. 2 of the Act as follows:—

"2. In this Act, unless there is anything repugnant in the subject or context,—

(1) 'agricultural income' means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such;

(*b*) any income derived from such land by—

(*i*) agriculture, or

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (*ii*);

(*c*) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (*ii*) and (*iii*) of clause (*b*) is carried on :

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house or as a store-house, or other out-buildings."

It was admitted by the learned advocate for the assessee that the present case does not come under clause (*b*)—his contention being that the present case comes under clause (1) (*a*) of S. 2. It will be noticed that though the words used are "any rent or revenue", (the word "revenue" being a word of wider import than the word "rent"), the same must be "derived from land which is used for agricultural purposes". Could it be said that "fishery rent" is "derived from land which is used for agricultural purposes". In clause (*b*) the expression "derived from such land" occurs, and the light (if any)

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thrown by clause (*b*) does not enable me to say that fishery rent is "derived from land which is used for agricultural purposes". The lease granted to the lessees in the present case —Exhibit A—empowers the lessees to fish in the tanks and supply channels; and excepting the right to fish, the lessees have no other rights whatsoever in the water of the tanks and channels, nor over the bed of the tanks or the channels. It is therefore *prima facie* difficult to say that such income is derived from land which is used for agricultural purposes. The water of the tanks and connected supply channels is undoubtedly used for agricultural purposes, and I am prepared to assume for the purpose of argument that tanks and supply channels are lands used for agricultural purposes in a wide sense though no crops are raised—ordinarily, at any rate—on the site of tanks and supply channels. But the question is—is fishery income "derived from land which is used for agricultural purposes"? Right of fishery may be an interest in immoveable property, but that is not the question that I have to decide here.

The Zamindar may derive income by allowing the land to be used for various purposes which would not be agricultural. He may make money by allowing a *mela* to be held on the land, and it has been held that, income thus derived would not be agricultural income within the meaning of the Income-tax Act. See *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chaudhuri*[1]. He may let the land for shooting; he may similarly make money by allowing quarrying on the land; he may allow boating on the waters of the tanks and levy fees for the same; he may allow a ferry to be established across the tank, which may enable the public to travel from one side to the other in a convenient way, and levy fees therefor ; there may be springs in the tank, and even after supplying water necessary for the customary cultivation of wet lands under the Ayacut of the tank, he may sell the surplus water of the tank to a neighbouring village, town or municipality, for consumption by the people thereof, or let the water to the lands of the neighbouring village which otherwise may have no right to the said water, and receive money for the same. Other instances might be imagined. Could it be said that such incomes are rent or revenue derived from land which is used for agricultural purposes. The word "agriculture," even in its widest import, has

1. (1901) I. L. R. 28 Cal. 637.

received some sort of definite and restricted meaning, and I find it difficult to bring fishery under the heading "agriculture" even in its widest sense as ordinarily understood.

The provisions in S. 2 of the Income-tax Act exempting incomes derived from certain buildings only on such lands from assessment under the Income-tax Act would also seem to support the respondent's contention.

The definition of "rent" in the Madras Estates Land Act was referred to, but I do not think that any real benefit is derived by reference to the Estates Land Act in this case. In the first place, the two Acts (The Indian Income-tax Act and the Madras Estates Land Act) were passed by two different Legislatures, and it cannot, ordinarily, be that the expression "agricultural income" should have one meaning in one Presidency and another meaning in another, seeing that the Indian Income-tax Act extends to the whole of British India. Further, the definition of "rent" in the Madras Estates Land Act is only for the purposes of that Act and to enable the special remedies provided for by that Act being available to realise rent as defined therein. I do not therefore consider that the provisions of the Estates Land Act that were referred to really help me in the decision of the exact question before me.

Before the Privy Council, a similar question as the one raised before us seems to have been raised. Among the ten items included in the assessment in the case before the Privy Council, the first item referred to "*jalkar* or rents received from fisheries," and the first question referred to the Full Bench in that case was whether the ten sources of income specified were agricultural incomes and therefore exempt from assessment to income-tax under S. 4 (3) (*viii*) of the Act. Their Lordships of the Privy Council noticed that matter at page 448 in *Probhat Chandra Barua* v. *King-Emperor*[1].

"Question 1 was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or reasons which would justify them in suggesting that any of the 10 specified items could properly be described as agricultural income, within the definition of agricultural income contained in S. 2 (1) of the Indian Income-tax Act, 1922. Their Lordships accordingly agree with the negative answer which has been given to Question 1".

No decision directly deciding this question in favour of the assessee was cited to us by the learned advocate for the

1. (1930) L. R. 57 I. A. 228: I. L. R. 58 Cal. 430 : 59 M. L. J. 814 (P. C.).

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assessee. On the other hand, some decisions of Indian Courts were cited to us by the learned advocate who appeared for the Commissioner of Income-tax as supporting the contention of the Crown. I have already noticed the decision in *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chaudhuri*[1]—the *mela* case.. At page 639 the learned Judges Rampini and Gupta, JJ., observed as follows :—

> "It would seem to us that the profits of a *mela* cannot be regarded as incomes derived from agriculture. The land on which the *mela* is held is no doubt land used for purposes of agriculture when it is not being used for the purposes of the *mela*, but when it is being used for the purposes of the *mela*, it is not being used for agricultural purposes, and therefore the profits of the *mela* are not incomes, which would be exempt from income-tax under S. 5 of Act II of 1886."

In *Emperor* v. *Probhat Chandra Barua*[2] it was held that income derived from fisheries, and from *sthaljat* (*i.e.*, land used for stacking timber) is not "agricultural income" or "income derived from land which is used for agricultural purposes" within the meaning of Ss. 2 and 4 of the Income-tax Act (XI of 1922). The question is discussed by Rankin, J. (as he then was) at page 524 :

> "It remains to consider the Assessee's claim to exemption as a claim to come within the provisions of S. 2 of the Act. In my opinion, income derived from a fishery is not 'rent or revenue derived from land which is used for agricultural purposes. Learned counsel for the Assessee has suggested that land used for agricultural purposes becomes at certain seasons flooded, and that in *bhils* and *dobas* thus formed over such land there may be rights of fishing of some value. Any such case will require careful consideration on its own facts. If the argument is that the income in such a case is 'derived from land which is used for agricultural purposes' although it is not derived from any such use, it may be observed that the decision in the *mela* case—[*Umed Rasul Shaha Fakir* v. *Anath Bandhu Chaudhuri*[1]] is some authority the other way. From the papers in the present case I do not collect that this is the special case made by the Assessee, who claims to own extensive fisheries called *jalkar* mehals, which are leased out, in consideration of the payment of rent called *jalkar* rent. In my opinion, 'fishery' is not 'agriculture' nor an 'agricultural purpose,' and income derived from fisheries is not exempt as such even when the fisheries are comprised in a permanently settled estate."

Similarly Page, J. (as he then was) remarked at page 528 as follows :—

> "I agree with the view expressed by the Commissioner that income derived from fisheries cannot reasonably be regarded as income derived from agriculture, however wide the meaning may be, which is attributed to the word agriculture It is, I think, unnecessary to dilate upon the subject and, in my opinion, income derived from fisheries is not within any of the exemptions set out in S. 4 of the Income-tax Act."

The Patna High Court had to consider this question in the case reported in *Maharajadhiraj of Darbhanga* v. *Commis-*

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1. (1901) I. L. R. 28 Cal. 637. 2. (1924) I. L. R. 51 Cal. 504.

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sioner of Income-tax,[1] where they held that "rent derived from *jalkar* (fisheries), *hats* (markets) and *ghatlagi* (moorings and ferries) is not income derived from agriculture". Sir Dawson Miller, C. J., discussed this question at page 486. Reference was made to the Oxford Dictionary, among others, to understand the meaning of the word "agriculture". This is what the learned Chief Justice stated at page 485 :

"It was urged, however, that fisheries were, or might be in certain cases, as where the fishing is from tanks, so intimately connected with the pursuit of agriculture that they should be included under that designation. The popular conception of agriculture, even if it should include the rearing of live stock and poultry fed on the produce of the land and requiring in certain cases cultivation of the land for grazing purposes, or otherwise, seems hardly wide enough to include the rearing of fish in rivers or tanks. Agricultural income is defined in clause (2) of the Income-tax Acts of 1918 and 1922. The definition includes rent or revenue derived from land used for agricultural purposes as well as income derived from agriculture and from the sale of agricultural produce. The definition does not carry the case any further. The question is whether the rent paid for the fishing rights, or for the markets, ferries or moorings is income derived from agriculture. In my opinion it is not. The fact that the Bengal Tenancy Act by S. 193 applies the procedure provided by the Act for the recovery of arrears of rent to suits for recovery of anything payable in respect of fishery rights and the like is of no assistance to the petitioner It rather emphasises than otherwise the difference between revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section. Nor does it seem reasonable to hold that income derived from fishing over land covered by water and which is not used for any agricultural purpose is income derived from agriculture. Fish are not the produce of the land. Their natural element is the water and their cultivation and welfare depend in no sense upon agriculture. It may be that in certain cases the *jalkar* rights include the right to cultivate the soil of the tank when dry but the facts of this case do not show that the income sought to be exempted from tax was other than that derived from the right to catch fish. In my opinion the question whether the income derived from *jalkar*, *hats*, and *ghatlagi* is agricultural income and so exempt from income-tax should be answered in the negative."

Reference was made by the learned advocate for the assessee to Halsbury's Laws of England, Volume 14, page 572; but I do not think that that really solves the question before us. Right to fishery may be an interest on the immoveable property, but that does not, in my opinion, lead to the conclusion that income from leasing the right to catch fish in a tank is agricultural income within the meaning of the Income-tax Act.

For the above reasons, I am of opinion, that the assessee's second contention also should be overruled.

It follows that the income of Rs. 6,956 derived by the assessee from the lease of the right to fish in the tanks and connected supply channels in the Zamindari was properly included

1. (1924) I. L. R. 3 Pat. 470.

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in the assessment made under the Income-tax Act, and I agree with my Lord that the question should be answered in the negative.

Cornish, J.—I am of the same opinion. I do not think it makes any difference whether the money paid to the Zamindar for the fishing rights in his tanks is called rent or revenue. It might be described by either word. The test of its exemption from income-tax is whether it is "agricultural income" as defined by the Act. One of the purposes for which the tanks are used is irrigation, which is undoubtedly an agricultural purpose. But the money sought to be taxed is received for the right of catching fish, and there is ample authority that the use of a tank as a fishery is not a use of land for agricultural purposes: *Probhat Chandra Barua* v. *King-Emperor*[1], *Emperor* v. *Probhat Chandra Barua*[2] and *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*[3]. In those cases, it is true, the tanks do not appear to have been used for any other purpose than a fishery. And in the Patna case, Sir Dawson Miller, C. J., suggests that it might make a difference if the fishing rights included a right to cultivate the bed of the tank when dry. The argument here is that if the land is used for an agricultural purpose, any source of income from it is agricultural income. This supposes that agricultural income means income derived from agricultural land. But, the definition clause in Section 2 (1) (*a*) shows that the income intended is the income derived as rent or revenue from the use of the land for agricultural purposes. If this be so, the income derived from the use of the land for some purpose which is not agricultural is not "agricultural income".

K. C. *Question answered in the negative.*

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1. (1930) L. R. 57 I. A. 228: I. L. R. 58 Cal. 430: 59 M. L. J. 814 (P. C.).
2. (1924) I. L. R. 51 Cal. 504. 3. (1924) I. L. R. 3 Pat. 470.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR DINSHAH MULLA.

The Secretary of State for India in Council .. *Appellant**

v.

Velivelapalli Mallayya, since deceased, and others .. *Respondents.*

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Grant—Inam—Extent of—Inam register showing extent in putties *and acres—Actual acreage found to be much larger—Boundaries correctly described in* pechu *accounts—Grant of entire village or only of specified acreage—"Major" and "minor" inams—*Khandrika*—Meaning of.*

The extent of Gudimala Khandrika (a part of the village of Rameswaram in Godavari District) was stated, in the *bhuband* accounts of the village prior to 1858, to be 70 odd *putties.* The original grant of the inam in favour of the temple was lost but in 1860 when the grant was confirmed the extent was specified in the Inam Register both in *putties* and in acres, viz., 70 odd *putties* or 560·79 acres. From at least 1860, the temple was in possession and paid only Rs 20 as quit-rent for the entire inam. In the re-survey of 1901, the extent of the *khandrika* was in fact found to be 1837·40 acres. In 1917, the Board of Revenue resolved that the extent of the inam settled on the temple was only 560·79 acres and that for the excess, full assessment should be levied.

Held that, having regard to the boundaries of the inam specified in the statements of the Kulkarni in 1859, the demarcation numbers in the Inam Register prepared about 1860, and the figures in the *pechu* accounts of 1866 confirmed by the Inam Commissioner in 1872, what was settled as inam was the whole village of Gudimala Khandrika and not only 560·79 acres and that the excess was not subject to full assessment.

Technically, a major inam is a whole village or more than one village, and a minor inam is something less than a village.

A *khandrika* means a small hamlet. It is a large block of land granted as inam, less than a village, but much larger than an ordinary inam.

Consolidated Appeal No. 117 of 1929 from a judgment and two decrees, dated the 10th December, 1926, of the High Court of Madras, modifying a judgment and two decrees, dated the 24th December, 1921, of the Court of the Subordinate Judge of Rajahmundry, and made in Original Suits Nos. 72 and 73 of 1919.

The main questions for determination on the appeal were:—(1) Whether the respondents (*archakas* of a temple) were entitled to hold possession of lands, the subject-matter of Suit No. 72 of 1919, as rent-free inam lands, *i.e.*, without the payment of any assessment to Government, and (2) Whether the respondents were liable to pay a water-rate on the lands the subject-matter of Suit No. 73 of 1919.

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*P. C. Appeal No. 117 of 1929. 29th July, 1932.

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The High Court having decided in favour of the plaintiffs-respondents, the defendant (Government) appealed to His Majesty in Council.

De Gruyther, K. C. and *Wallach* for appellant.

Dawson Miller, K. C. and *Narasimham* for respondents.

29th July, 1932. Their Lordships' judgment was delivered by

SIR DINSHAH MULLA.—The principal respondents in this appeal are the *archakas* of the temple of Sri Krita Kritya Rameswara Swami Varu in a place known as Gudimala Khandrika which forms part, as would appear from a survey map presently to be referred to, of the village of Rameswaram, situated in the Godavari District. Years ago, a grant was made of certain lands in Gudimala Khandrika to the temple as inam, but the grant is lost and its origin is not known. In 1860 the grant was confirmed by the Inam Commissioner, subject to the payment of a quit-rent of Rs. 20 per year, and a title deed was issued to the temple, which, however, is not forthcoming. The main question in the appeal is as to the extent to which the grant was confirmed.

It is usual to divide inams into two classes, namely, (1) major, and (2) minor. Technically, a major inam is a whole village or more than one village, and a minor inam is something less than a village. A *khandrika* means a small hamlet. It is a large block of land granted as inam, less than a village, but much larger than an ordinary inam. *See* Mr. Maclean's Manual of the Administration in the Madras Presidency, Vol. III.

The first regular revenue survey in the Godavari District began in 1858. Demarcation and classification were completed in 1860-61, and field measurements in 1862. The survey map of the Rameswaram village was completed in 1862, and the total area of the village is stated on the map to be 3,860 acres.

It would appear from the *bhuband* accounts of the Rameswaram village that before the survey of 1858 the extent of the village, as well as of Gudimala Khandrika, was expressed in *putties*, a local measure, the extent of the village being 307 odd *putties*, and that of Gudimala Khandrika 70 odd *putties*. There is nothing to show the extent of the village or of the Khandrika in acres before that date, nor is there any direct

evidence as to the rate of conversion from *putties* into acres prevailing at that time.

In 1860, when the grant was confirmed, the extent of Gudimala Khandrika was specified in the Inam Register both in *putties* and in acres, the extent in *putties* being 70 and a fraction, as in the *bhuband* accounts, and that in acres being 560·79. It would appear from these figures that the rate of conversion then adopted by the Inam Commissioner was 8 acres per *putti*. But the temple has been in possession at least since 1860 of the whole of Gudimala Khandrika, and it paid only Rs. 20 per annum for the whole land in its possession until 1917.

As has already been stated, the extent of the Khandrika in local measure was 70 *putties* and odd. At the re-survey and re-settlement of 1900-01 it was found, excluding Government *poramboke*, to be 1,837-40 acres. If 70 *putties* and odd be regarded as equivalent to 1,837·40 acres, the rate of conversion would be 27·35 acres per *putti*, and not 8 acres per *putti*, which was the rate adopted by the Inam Commissioner. The main question in the appeal is as to the extent to which the inam was settled in 1860, whether it was 560·79 acres as stated by the appellant, or 1,837·40 acres as claimed by the respondents. This involves a subsidiary question whether the proper rate of conversion is 8 acres per *putti* as alleged by the appellant, or 27·35 acres per *putti* as contended by the respondents. The respondents say that the Inam Commissioner erroneously converted *putties* into acres at the rate of 8 acres per *putti*.

The inam consists partly of wet and partly of dry land. As in the case of the inam, so in the case of wet land, the extent in the Inam Register is described both in *putties* and in acres, the extent in *putties* being 51½, and that in acres 400 which obviously is a mistake for 412. Here again the rate of conversion adopted by the Inam Commissioner was obviously 8 acres per *putti*. If the rate were taken at 27·35 acres per *putti*, the extent in acres would be 1,408. One of the questions in the appeal is whether the temple is entitled to hold 412 acres only free of water-cess as is the case for the appellant, or 1,408 acres as claimed by the respondents.

No demand was made by the revenue authorities of any assessment or water-cess against the temple until 1917. In that year the Board of Revenue passed a resolution to the effect that what was settled by the Inam Commissioner was not a whole

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but a minor inam, that the extent of the inam so settled was 560·79 acres only, and that the excess in the possession of the temple should be charged with full assessment. By the same resolution it was determined that the extent of wet land included in the inam was 412 acres only, and that irrigation by the temple of any area in excess thereof should be charged with water-cess. The Board, in fact, took their stand on the extent as expressed in the Inam Register in acres. Effect was given to this resolution by the Collector of Godavari, and the respondents had to pay the assessment and water-cess imposed by the Collector.

Thereupon the respondents brought two suits out of which the present appeal arises against the appellant (who was the principal defendant in them both) on the 24th October, 1919, in the Court of the Subordinate Judge of Rajahmundry, one for a declaration that the whole village of Gudimala Khandrika was settled as inam, and not 560·79 acres only, and the other for a declaration that the extent of the wet land was 1,688 acres (being the extent given in the *Adangal* account of the Khandrika for 1901), and not 412 acres only. The respondents also asked in each suit for an injunction and other relief.

The appellant filed a written statement in each suit, repeating in substance the resolution of the Board of Revenue of 1917.

The Subordinate Judge heard both the suits together, and delivered one judgment in both. He held that what was settled by the Inam Commissioner was not a whole but a minor inam, that the extent of the inam was 560·79 acres, and that of the wet land was 412 acres, and he passed a decree in each suit dismissing the suit with costs.

On appeal the High Court at Madras reversed the decrees of the Subordinate Judge. They held that the whole village of Gudimala Khandrika was settled as inam, and that the extent of the inam was 1,837·40 acres. As to wet land they held that its extent was 51¼ *putties* as given in the Inam Register, and that it should be converted into acres at the rate of 27·35 acres per *putti*, and that the extent so converted was 1,408 acres. Accordingly, they passed a decree in each suit in favour of the plaintiffs-respondents. The defendant-appellant has appealed from these decrees to His Majesty in Council, and the appeals have been consolidated and heard as one appeal.

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It was argued before their Lordships on behalf of the appellant that the extent of the inam as given in acres in the Inam Register was conclusive and that the learned Judges of the High Court erred in referring to the area in *putties* and in converting it into acres at the rate of 27·35 acres per *putti*. It must be recognised that there is no direct evidence of the rate of conversion, but the extent of the inam having been given in the Inam Register both in acres and *putties*, there is no reason why the extent in *putties* should be disregarded and the case decided with exclusive reference to the extent in acres. Their Lordships consider that the real question for determination is, whether what was intended to be settled by the Inam Commissioner in 1860 was a whole inam or a minor inam only; in other words, whether it was the whole village of Gudimala Khandrika that was then settled, or only 560·79 acres in it.

The Inam Commission was appointed on the 16th November, 1858, to inquire into title to inam lands. The mode in which the operations of the Commission were conducted has been described by Mr. Maclean* as follows:—

"Much information was prepared regarding the inams of each village by the taluq and village officers, and the Deputy Collector of the Commission inspected documents and took such further evidence as seemed proper, recording details in an English Register in which the rate of enfranchisement was calculated and the acceptance or refusal of the inamdar recorded. These registers were subsequently forwarded to the Commissioners for review and confirmation and for the issue of a title deed."

As regards the land in the possession of the temple, two statements were prepared by the *kulkarni* of the village, both dated the 20th December, 1859, one in respect of 50 *putties* stated to be equivalent to 400 acres, and the other in respect of the remaining 20 odd *putties* stated to be equivalent to 160·79 acres. The statements also give the boundaries of the inam and the extent both of the dry and wet land in the inam.

The Inam Register gives the extent of the inam and that of the dry and wet land both in *putties* and in acres as in the *kulkarni's* statements. It does not, however, give the boundaries, but specifies the demarcation numbers of the inam, which will presently be referred to. The Inam Commissioner considered that the title of the temple to the 20 *putties* was doubtful, and he imposed a quit-rent of Rs. 20 per year on the inam.

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* *See* Standing Information regarding the Official Administration of the Madras Presidency, 2nd ed., 1879, p. 154.

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The entries in the Register were confirmed by the Inam Commissioner in January, 1860, and one title deed was issued in respect of the whole inam. The title deed, as already stated, is not forthcoming, but it was agreed that its contents must be taken to be the same in substance as those of the Inam Register.

It is obvious from the entries in the Inam Register that the rate of conversion adopted by the Inam Commissioner was 8 acres per *putti*, and it is this rate that is relied on by the appellant. It is also the rate adopted by the *kulkarni* in his statements, but neither the boundaries nor the demarcation numbers bear out that rate.

As to the boundaries given in the *kulkarni's* statements, the Subordinate Judge considered that they were not the boundaries of Gudimala Khandrika; the High Court considered that they were. Their Lordships have examined the survey map, and they agree with the learned Judges of the High Court that the boundaries are not the boundaries of plots of land containing merely 560 acres, but of the whole of the Gudimala Khandrika claimed by the respondents as inam.

The Inam Register gives the demarcation numbers of "fields comprised in the grant," and they are "from 595 to 765". It was not disputed that these numbers coincide with the corresponding survey numbers of the inam. The numbers are important, for the extent of each of these survey numbers is given in the Survey and Settlement Register of 1866, and the total extent of Survey Nos. 595 to 765 amounts to about 1,800 acres, a figure which approximates the respondents' claim. To get over this difficulty, it was argued on behalf of the appellant that Survey No. 765, which itself contains about 845 acres, was a huge swamp, and ought not therefore to have been included in the demarcation numbers in the Inam Register. Their Lordships think that there is no substance in this argument, and that No. 765, having been expressly mentioned in the Register, there is no reason why it should be excluded in determining the extent of the inam.

If the boundaries of the inam are correctly stated in the *kulkarni's* statements, and it was not suggested that they were not, there can be little doubt that what was intended to be settled was the whole village and not merely part thereof.

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Again, if the demarcation numbers are correctly stated in the Inam Register, as their Lordships think they are, it is impossible to maintain that the correct extent of the inam, when settled in 1860, was 560 acres only, as contended by the appellant; it must be somewhere near 1,800 acres. Their Lordships think that the boundaries and the demarcation numbers completely destroy the appellant's case.

Next in order of date is the *pechu* account of Gudimala Khandrika. The account came to be prepared in this way: in 1865 the Board of Revenue passed certain rules contained in Standing Order No. 61 of the Board for dealing with excess over and above the area entered in the Inam Commissioner's title deeds, which might in the course of the revenue survey be discovered in "minor" inams. The following is the material part of the Order:—

"(ii) *Allowance for low rate of conversion and inaccuracies of measurement.*—Should it appear on survey that the customary local rate for converting the native measure into acres is inadequate, then the inamdar should be allowed free of all additional charge such area in acres as, on the average of the village in which the land is situated, may appear fairly to represent the registered extent of the inam in the local native measure, *plus* an allowance of ten per cent. to cover original inaccuracies of measurement.

"(iii) *Charge for survey of excess.*—Any excess in the inam discovered by survey beyond the area thus calculated should be charged with full assessment leviable on land of similar quality in the same village."

Pursuant to the above order, two *pechu* or "excess" accounts were prepared by the village officer, one of the Rameswaram village, excluding Gudimala Khandrika, and the other of Gudimala Khandrika, both dated the 5th June, 1866. It would appear from the former account that a *putti* in that part of the village was found to be equivalent to about 8·50 acres, and the excess over 8·50 *plus* 10 per cent. was treated as an encroachment liable to full assessment. Such an excess was found in fact in some of the inams mentioned in the account, and the account shows the extra amount payable in respect of the excess. But it is quite different as regards the Gudimala Khandrika account. The account gives in column 2 the extent of the inam in local measure, namely, 70 odd *putties*, and in column 4 its extent as entered in the registered *patta*, that is, 560·79 acres. These figures are the same as those in the Inam Register. The account then gives in column 12 the extent as found on actual survey, namely, 1,917·6 acres, being about 1,356 acres more than that in the Inam Register, and in column 17 the total amount of "assessment to be collected

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hereafter," which is there stated to be Rs. 20 per year, this amount being the same as that in the Inam Register. It is clear from this account that though the extent of this inam was found on survey to be in excess of that in the title deed, the amount payable by the inam was not increased. This could only be on the footing that the 1,356 acres were not treated as an "excess" within the meaning of Standing Order No. 61, which again could be accounted for only if the 70 *putties* and odd were treated as equivalent to 1,917·6 acres. And this is exactly what the officer who prepared the account would appear to have done, for the figures 1,917·6 appear also in column 6, and the heading of that column, supplementing the torn part from the heading of the corresponding column of the *pechu* account of Antervedi, may fairly be taken to be, "Acres at 27·35 per *putti corresponding to the measurement in the country* on the acreage of the village in the survey". His mode of dealing with this particular inam shows clearly that the officer responsible for it treated the inam not as a minor, but as a whole inam. The account cannot be explained on any other footing.

It would appear from the judgment of the trial Judge that it was suggested before him on behalf of the appellant that the officer who prepared the account was "rather actuated by a desire to benefit in some way the religious institution in question," and the suggestion was accepted by the trial Judge. Again, it is stated in ground No. 12 of the grounds of appeal set out in the petition for leave to appeal to His Majesty in Council, that the High Court ought not to have attached any weight to the two *pechu* accounts as they were on the face of them "unreliable and fraudulent". This, no doubt, was the only available ground on which the *pechu* account of this inam could be assailed, but there was no foundation for it, and it is gratifying to note that these charges were not repeated before this Board.

What was done by the village officer in 1866 was confirmed by the Inam Commissioner in 1872. In that year there was some correspondence between the Collector of Godavari and the Inam Commissioner from which it would appear that for the purpose of assessment, Gudimala Khandrika was treated as a separate village with a recognised boundary, and therefore not liable to further assessment, while as regards the rest of the

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Rameswaram village the excess over 9·37 acres was charged with full assessment. The figure 9·37 is made up of 8·52 acres, being the average per *putty* in that part of the village as found on survey, and ·85 acre, being the 10 per cent. allowance mentioned in the Standing Order. This shows that the inam of Gudimala Khandrika was recognised as a whole inam, while the inams in the rest of the Rameswaram village were treated as minor inams.

Then came certain proceedings in 1876 as regards the village-cess of the inam, which, though not connected in any way with assessment, are remarkable for the fact that the extent of the inam is there stated to be 1,909·93 acres, and the inam is regarded as an "entire village".

Lastly, at the re-survey and re-settlement in 1900-1901, the inam was surveyed as a separate village, and its extent was found to be 1,910·87 acres, of which 1,837·40 acres was stated to be inam, and the rest Government *poramboke*. It would also appear from the *Adangal* account of Gudimala Khandrika for 1901 that the wet land was 1,693 acres, which was the extent originally claimed by the respondents in the suits.

Upon a consideration of the documents mentioned above, their Lordships are of opinion that the whole village of Gudimala Khandrika was settled as inam, and they are in complete agreement with the High Court in all the conclusions reached by them.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondents' costs of the appeal.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *Douglas, Grant and Dold.*

K. J. R./S. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT :—LORD RUSSELL OF KILLOWEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Musammat Brij Indar Kuar .. *Appellant**

v.

Thakur Jai Indar Bahadur Singh .. *Respondent.*

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Musammat Brij Indar Kuar *v.* Thakur Jai Indar Bahadur Singh.

Receiver—Administration suit—Annuity charged on property—Payment by judgment-debtor of arrears of annuity to Receiver appointed by the Court—Defalcations of Receiver—Remedy of annuitant against the property charged not affected—Civil Procedure Code, 1908, *O.* 21, *R.* 1 (*c*).

The appellant, who was entitled under a will and codicil to an annuity charged on certain properties, brought a suit for administration of the testator's estate against the respondent, the residuary legatee, and obtained a decree, affirming the charge and appointing a Receiver. The respondent paid to the Receiver the arrears of annuity due to the appellant, but the Receiver misappropriated the same, and the appellant applied for execution of the decree by sale of the properties charged with the payment of her annuity.

Held, (1) that the Receiver was not an agent of the appellant with authority to receive payment on her behalf, (2) that there was no order of the Court under which the respondent paid or was authorized to pay the money to the Receiver, and (3) that under the circumstances, the appellant was entitled to recover the arrears of the annuity by sale of the properties charged.

Judgment of the Chief Court of Oudh (reported in 117 Indian Cases 748) reversed.

Appeal No. 56 of 1930 from a decree of the Chief Court of Oudh, dated the 1st March, 1929, which varied a decree of the District Judge of Lucknow, dated the 4th July, 1928.

The facts of the case are fully set out in their Lordships' judgment.

The main question for determination on the appeal was whether, when a Receiver appointed by the Court in an administration suit misappropriates moneys paid to him by the judgment-debtor for payment to the decree-holder, the loss should fall on the judgment-debtor or on the decree-holder? The Full Bench of the Chief Court of Oudh held, after referring to the decisions in *Orr* v. *Muthia Chetti*[1] and *Muthia Chetti* v. *Orr*[2], that, in the circumstances, the loss occasioned by the defalcations of the Receiver should be borne by the decree-holder.

Against the said decision of the Chief Court, the decree-holder appealed to His Majesty in Council.

Dunne, K. C. (with *Amiend Jackson*) for appellant —The Receiver was not the agent of the appellant, so as to bind her by

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*P. C. Appeal No. 56 of 1930. 9th May, 1932.
Oudh Appeal No. 13 of 1929.

1. (1894) I. L. R. 17 Mad. 501. 2. (1897) I. L. R. 20 Mad. 224.

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receipts of money belonging to the estate which he never paid to her but misappropriated. No such payments to the Receiver could constitute payments to her (the decree-holder), so as to bar her rights under the decree : *Orr* v. *Muthia Chetti*[1] and *Muthia Chetti* v. *Orr*[2] and O. 21, R. 1, Civil Procedure Code, referred to.

The charge in respect of the annuity created in the appellant's favour was still subsisting and was not superseded by the Receiver's defalcations, and the appellant was not precluded from having the properties charged put up for sale.

De Gruyther, K. C. (with *Wallach*) for respondent.—Payments made to the Receiver under the directions of the Court in the administration suit, would discharge the judgment-debtor: see clause (*c*) of O. 21, R. 1 of the Code.

[Their Lordships observed that there was no order of the Court directing payments of the annuity to the Receiver.]

The Chief Court assume that the payments were required to be made to the Receiver under an order of the Court.

Dunne, K. C. replied.

9th May, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—Thakur Rajindra Bahadur Singh died on the 18th October, 1912, leaving a will, dated the 14th June, 1907, and a codicil, dated the 4th October, 1912. By his will he bequeathed the residue of his estate to his nephew, who is the respondent before this Board. By his codicil he left a monthly sum of Rs. 200 to the appellant, Rs. 500 to his widow, Rs. 300 to another daughter and Rs. 30 to a female servant, and charged certain properties with the payment of the annuities.[3]

All the annuities fell into arrears, and on the 30th January, 1920, the appellant, who was then a minor, brought the suit out of which the present appeal arises against the respondent to recover the arrears of the annuity due to her, for the administration of the estate of the testator, and for the appointment of a receiver. The other annuitants were joined as defendants to the suit.

Two other suits were also filed, one by the appellant's sister and the other by the servant, to recover the arrears of the annuities due to them.

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1. (1894) I. L. R. 17 Mad. 501. 2. (1897) I. L. R. 20 Mad. 224.
3. The rights of the annuitants were dealt with and declared by the Privy Council in 22 C. W. N. 305.—K. J. R.

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All three suits were heard by the District Judge of Lucknow, and on the 14th October, 1922, a preliminary decree was passed for the administration of the estate. Babu Brijmohan Dayal, a pleader of the Court, was appointed receiver without security, with power to sell the properties, and a scheme was framed for the payment of past as well as future annuities to all the four annuitants. A schedule of the properties charged with the payment of the annuities was appended to the decree.

Against this decree the respondent appealed to the Court of the Judicial Commissioner of Oudh, proposing an alternative scheme for the payment of the arrears, which up to the 18th October, 1923, had amounted to Rs. 73,950-8-0, and for the payment of future annuities. The Judicial Commissioner considered that the scheme was reasonable, and passed a decree on the 13th December, 1923, declaring that the appellant was entitled to Rs. 26,400 for arrears up to the 18th October, 1923, and to a further payment of Rs. 200 per month for her life, and providing for the payment of the Rs. 73,950-8-0 out of two sums, one of Rs. 47,668-15-6, being the aggregate of four of the items specified in the schedule to the decree, and the other of Rs. 26,281-8-6 which the respondent was ordered to pay into Court to make up the Rs. 73,950-8-0. The four items referred to above were:—

Rs.	A.	P.		
3,493	0	0	..	Estimated value of cattle in the possession of the receiver.
27,929	4	7	..	Represented by War Bonds purchased out of Rs. 20,000 paid into Court by the Court of Wards under a decree for Rs. 1,00,000 and deposited for safe custody with the Allahabad Bank, Lucknow.
1,746	10	11	..	Price of cattle sold by receiver.
14,500	0	0	..	Government promissory notes also deposited with the Allahabad Bank.
47,668	15	6		

It would appear that the respondent was restrained by an injunction from realising the decree for Rs. 1,00,000 against the Court of Wards. It was directed by the decree that if the respondent paid into Court Rs. 26,281-8-6 and executed certain hypothecation deeds on or before the 12th March, 1924, the injunction should be dissolved, otherwise the appeal should be dismissed. The decree also contained a clause providing that "all the annuitants shall be entitled to recover their annuities

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from the properties " specified in the decree. As regards future payments, it was directed that they should be made every six months instead of every month.

The respondent paid the Rs. 26,281-8-6 into Court, and filed the hypothecation deeds within the time fixed by the Court, and the injunction was removed by an order made on the 18th March, 1924.

Subsequently the receiver complained to the Court that no cattle had come into his possession, nor had any been received by him, and that the value of the War Bonds and the Notes had been over-estimated. Thereupon the respondent undertook to pay into Court the two cattle items and the deficiency, if any, that might arise on a sale of the securities.

In July, 1924, the receiver obtained possession of the securities from the Allahabad Bank, and he absconded in September, 1925. It is not known what he did with the securities, nor is it known how much he paid to the other annuitants.

After several fruitless attempts to recover the annuity due to her, the appellant presented an application to the District Judge on the 5th April, 1928, for execution of the decree by sale of the properties charged with the payment of the annuities under the decree. She stated that, in addition to the Rs 26,400 awarded to her by the decree, a further sum of Rs. 3,600 had become due to her from the 19th October, 1923, up to the 18th April, 1925, and that nothing had been paid to her. She also complained that the respondent had failed to pay into Court the several sums which he had undertaken to pay.

To this the respondent filed a reply raising various contentions as regards his undertaking. He also alleged that he had paid to the receiver three six-monthly instalments of Rs. 6,180, Rs. 6,000 and Rs. 6,180 on account of annuities due from the 19th October, 1923, to the 18th April, 1925, and contended that if the receiver misappropriated the money and the securities, the loss should be borne by the appellant and the other annuitants.

The District Judge found against the respondent on all points, and by his order, dated the 4th July, 1928, he directed execution to issue.

Against this order the respondent appealed to the Chief Court of Oudh. The learned Judges agreed with the District

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Judge that the respondent had failed to carry out his undertaking, but they held, differing from him, that the payment by the respondent of the three sums to the receiver was proved. The question as to who should suffer for the receiver's defalcations was, they thought, one of great importance, and they referred the following question to a Full Bench:—

"Where the judgment-debtor is proved to have paid money, due from him under a decree passed by the Court, to the Receiver appointed by the Court for realising certain sums of money and making payments to the decree-holder or decree-holders, or other money or property is proved to have come to his hands and the Receiver is found to have misappropriated the money and the property, on whom should the loss fall? Should the loss fall on the judgment-debtor or on the judgment-creditor?"

The answer given by the Full Bench was that the loss should be borne by the judgment-creditor, that is, the appellant.

After receipt of the opinion the learned Judges delivered their judgment. They held that, having regard to the opinion of the Full Bench, the only liability of the respondent was to pay what he had undertaken to pay into Court, which they fixed at Rs. 13,621-14-10. Accordingly, they passed a decree on the 1st March, 1929, declaring that the respondent was liable to pay Rs. 13,621-14-10, out of which the appellant was entitled to only a proportionate share, based apparently on the supposition that the other annuitants were in like case with the appellant, as to which there was no evidence. They also directed that unless the respondent paid the amount into Court on or before the 1st June, 1929, a sufficient portion of the properties should be attached and sold, but they seem to have given no direction as to the disposal of the sale proceeds in that event. From this decree the appellant has brought the present appeal to His Majesty in Council.

It was urged before their Lordships on behalf of the appellant that the charge created by the decree was not affected by the defalcations of the receiver, and that no payment having been made to her, she was entitled to be paid the full amount claimed by her out of the properties charged with the payment of the annuities. On the other hand, the respondent contended that except in respect of Rs. 13,621-14-10, which the Appellate Court had ordered him to pay, the charge had been satisfied and the properties freed from all liability to the appellant except for future instalments of her annuity. Their Lordships are unable to accede to this contention. In their opinion, the charge created by the codicil and affirmed by the decree was in

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no way affected or impaired by the embezzlement of the receiver. The decree provides in express terms that all the annuitants are entitled to recover their annuities from the properties charged. The appellant has admittedly received no part of the annuity due to her. She is, therefore, entitled to recover it by sale of the properties, and that is all she has asked. She makes no claim against the respondent personally.

As regards the three half-yearly instalments, their Lordships think that it is clear that the respondent paid them to the receiver at his own risk. Counsel for the respondent have been unable to point to any order of the Court under which the respondent paid or even was authorised to pay these sums to the receiver, and it would be impossible to hold that he was the agent of the appellant with authority to receive payment on her behalf.

The analogy relied on by the Full Bench of payment by a judgment-debtor to a bailiff charged with the execution of a warrant of arrest or attachment is fallacious, as every such warrant empowers the bailiff in express terms to receive payment from the judgment-debtor.

Their Lordships cannot conclude this judgment without referring to what seems to have been a grave dereliction of duty on the part of the Court which appointed the receiver in this case. It may be that under the Civil Procedure Code the Court has discretion to appoint a receiver without security, but it should obviously be done only in the most exceptional circumstances. In the present case all the parties to the suit, except the respondent, were females, and the appellant was until recently a minor. Under such circumstances their Lordships are unable to understand upon what ground the receiver could have been appointed without giving adequate security, and have been allowed to have the apparently unfettered control of money and securities to a large amount. Their Lordships think that the matter should be taken into consideration by the Chief Court and some very definite means devised whereby the recurrence of such a blot on the administration of justice may be avoided.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Chief Court, dated the 1st March, 1929, should be set aside, and the order of the District Judge, dated the 4th July, 1928, restored, subject to the variation that the properties should not

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be sold if the respondent pays Rs. 30,000 into the Chief Court within eight weeks from the date of the service upon him of a copy of the Order in Council. The respondent must pay the costs of the appellant in the Chief Court and before this Board.

Their Lordships granted a petition of the appellant for the admission of further documents. The respondent must also pay the appellant's costs of this petition and the supplemental record.

Solicitors for appellant: *James Gray & Son.*

Solicitors for respondent: *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD WRIGHT, SIR LANCELOT SANDERSON AND SIR DINSHAH MULLA.

Haji Mohammad Afzal Khan .. *Appellant**

v.

Malik Abdul Rahman and others .. *Respondents.*

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Haji Mohammad Afzal Khan *v.* Malik Abdul Rahman.

Co-sharers—Mortgage by one—Allotment of mortgaged property, on subsequent partition, to the other co-sharers—Mortgagee's remedy—Civil Procedure Code, 1908, S. 64—"Private transfer"—Arbitration out of Court—Award—Decree for partition in terms of—Transfer pursuant to.

Where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and thereafter on a partition the mortgaged properties are allotted to the other co-sharers, they take those properties in the absence of fraud free from the mortgage and the sole right of the mortgagee is to proceed against the properties allotted to the mortgagor in lieu of his undivided share. *Byjnath Lall* v. *Ramoodeen Chowdry*, (1874) L. R 1 I. A. 106, followed.

A transfer of property made pursuant to a decree for partition based upon an award is a transfer under an order of the Court and not a *private* transfer within the meaning of S. 64 of the Civil Procedure Code and cannot therefore be treated as void as against the claim of the attaching creditor, and it is immaterial, for this purpose, that the award was made on a private agreement to refer, *i.e.*, where the matters in difference were referred to arbitration without the intervention of the Court.

Appeal No. 102 ot 1931 from a decree of the Court of the Judicial Commissioner, North-West Frontier Province, dated the 1st July, 1930, reversing a decree of the Subordinate Judge of Peshawar, dated the 22nd November, 1929.

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* P. C. Appeal No. 102 of 1931. 14th July, 1932.

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The facts of the case are fully set out in their Lordships' judgment.

The following authorities were referred to during the arguments:—*Byjnath Lall* v. *Ramoodeen Chowdry*[1], *Qurban Ali* v. *Ashraf Ali*[2], *Kasi Viswanatham Chettiar* v. *Ramaswami Nadar*[3] and *Narayana Aiyar* v *Biyari Bivi*[4].

Dunne, *K. C.*, *Narasimham* and *K. Shrinivas Rao* for appellant.

De Gruyther, *K. C.* and *J. M. Parikh* for respondents.

14th July, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—The questions involved in this appeal relate to the effect of a partition of joint properties effected by a decree, where the decree is one made on an award, on a prior mortgage and a prior attachment of the share of one of the co-owners in some of the properties.

Haji Malik Rahman, a Mahomedan, died in or about 1910, leaving a will, dated the 12th June, 1910, whereby he devised certain immovable properties to his son Malik Mohib Ali, who is the third respondent in this appeal, and his two grandsons Sardar Ali and Sabz Ali, in three equal shares. On the death of Haji Malik Rahman, the third respondent entered into possession of the properties and recovered the rents and profits thereof on behalf of the family. Sabz Ali died in 1914 leaving two children, who are the first and second respondents in this appeal, and on his death his one-third share in the above-mentioned properties passed to them. The first and second respondents were both minors at the date of their father's death and also at the date of the suit out of which the present appeal arises.

On the 26th April, 1923, the third respondent and his son Sardar Ali executed a mortgage of some of the properties in favour of the appellant to secure payment of Rs. 1,00,000 lent and advanced to them by the appellant. The mortgage purported to be one with possession.

On the same day the appellant granted a lease of the mortgaged properties to the mortgagors at an annual rent of Rs. 12,000.

1. (1874) L. R. 1 I. A. 106: 21 W. R. 233.
2. (1882) I. L. R. 4 A. 219 (F.B.).
3. (1918) 35 M. L. J. 441.
4. (1922) I. L. R. 45 Mad. 103: 41 M. L. J 557.

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Some time thereafter Sardar Ali died without leaving any issue, and on his death his one-third share passed to his father, the third respondent, as his heir. The third respondent thus became entitled to a two-thirds share in the properties, the remaining one-third being the share of the first and second respondents.

The rent under the lease fell into arrear, and the appellant obtained three decrees for arrears for various periods against the third respondent, and in execution of the decrees attached four immovable properties, being properties other than those comprised in the mortgage, but forming part of the properties bequeathed by the will of Haji Malik Rahman.

Subsequently, on the 19th August, 1926, Musammat Tajwar Sultan was appointed guardian of the person and property of the first and second respondents. Soon after her appointment she demanded their one-third share in all the properties from the third respondent. This was followed by a reference to arbitration on the 4th September, 1926, and an award was made on the 7th January, 1927. The third respondent made a statement before the arbitrators, but he did not disclose the mortgage to them. By their award the arbitrators awarded to the first and second respondents in lieu of their one-third share and the mesne profits thereof (1) some of the properties comprised in the mortgage, and (2) all the four properties attached as aforesaid. On the 10th February, 1927, a decree for partition was passed in terms of the award under cl. 21 of Schedule II of the Civil Procedure Code, and the first and second respondents were in execution of the decree put in possession of the properties allotted to them. It is upon the effect of this award and decree that the decision of the questions in this appeal depends.

Subsequently an application was made on behalf of the first and second respondents under O. 21, R. 58 of the Code, to release the four properties from attachment, and the attachment was raised by an order dated the 18th January, 1928.

Thereupon, on the 13th December, 1928, the appellant brought the suit out of which this appeal arises in the Court of the Subordinate Judge of Peshawar to establish his right to attach the two-thirds share of the third respondent in the four properties, and for a declaration that he was entitled to proceed against the mortgaged properties to the extent of the

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two-thirds share of the third respondent in them. The plaint stated that the arbitration proceedings were collusive, and that even if they were not, neither the award nor the decree made on it could affect the appellant's rights under the mortgage or the attachment, as they both were of a date prior to the reference to arbitration. It would appear from the plaint that the appellant conceded that neither the mortgage nor the attachment was binding on the one-third share of the first and second respondents.

The Subordinate Judge held that the arbitration proceedings were collusive, and passed a decree for the appellant on the 22nd November, 1929.

On appeal the Court of the Judicial Commissioner, North-West Frontier Province, considered that the suit was one under O. 21, R. 63 of the Code, and that no claim in respect of the mortgage could be included in such a suit, and the claim was accordingly not entertained. As to the attachment they held that there was no evidence to show that the award was obtained by fraud, and that the order releasing the properties from attachment was therefore correct. Accordingly they reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. It is from this decree that the present appeal to His Majesty in Council has been brought.

Two contentions were raised on behalf of the appellant before their Lordships. The first was that where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and the properties so mortgaged are allotted on a partition by arbitration without the intervention of the Court to the other co-sharers, the partition, being subsequent in date to the mortgage, cannot affect the rights of the mortgagee to enforce his charge against the share of the mortgagor in the mortgaged properties. The second was that where the interest of one of several co-sharers in some of the properties held jointly by them is attached in execution of a decree against him, and those properties are subsequently allotted to the other co-sharers on a partition by arbitration without the intervention of the Court, a transfer by the judgment-debtor of the interest so attached to the other co-sharers is a private transfer within the meaning of S. 64 of the Civil Procedure Code, and therefore void as against the claim of the attaching creditor, even if the transfer was made pursuant

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to a decree passed on the award. It was not contended before their Lordships that the partition was unfair or that it was made with the object of defrauding the appellant.

The respondents abandoned before their Lordships the contention as to misjoinder of claims that had prevailed with the Appellate Court, and invited their Lordships to decide the question in respect of the mortgage on its merits.

As regards the first point, their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This was the view taken by the Board in *Byjnath Lall* v. *Ramoodeen Chowdry*[1]. In that case the partition was made by the Collector under Regulation XIX of 1814 (Bengal), and the mortgagee was seeking to enforce his remedy not against the properties mortgaged to him, but against the properties which had been allotted to the mortgagor in lieu of his undivided share; but the Board held that not only he had a right to do so, but that it was in the circumstances of the case his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. Their Lordships think that the principle enunciated in that case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents. The third respondent (the mortgagor) has not appeared before their Lordships, and their Lordships express no opinion as to any other rights which the appellant may have in respect of his mortgage.

It was brought to their Lordships' notice that on the 27th October, 1926, a suit had been brought by the appellant on the

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1. (1874) L. R. 1 I. A. 106.

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mortgage in the Court of the Subordinate Judge of Peshawar, and that a decree for money was passed in his favour on the 27th February, 1928, which was altered into a mortgage decree on the 29th January, 1931. No argument was addressed to their Lordships as to the effect of these proceedings on the present suit, and their Lordships express no opinion as to this either.

The second question falls to be decided under S. 64 of the Civil Procedure Code, which is as follows:—

> "Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein . . . . contrary to such attachment, shall be void as against all claims enforceable under the attachment."

A decree for partition may be made (1) in a suit for partition heard and decided by the Court itself; or (2) it may be made on an award in a similar suit, where the matters in difference between the parties to the suit are referred to arbitration by an order of the Court made on the application of the parties; or (3) it may be made on an award, where the matters in difference are referred to arbitration without the intervention of the Court, as in the present case.

It was not disputed before their Lordships that a transfer of property made pursuant to a decree in the first two cases was not a "private" transfer. But it was argued that a transfer made pursuant to a decree in the third case stands on a different footing, for the proceedings in that case originate not with a suit but with a private agreement to refer, and the transfer, therefore, must be regarded as a private transfer within the meaning of S. 64 and void as against the attaching creditor. Their Lordships are unable to accept this argument. They think that a transfer made pursuant to a decree in the third case is as much a transfer under an order of the Court as a transfer in the first two cases, and not a private transfer. As in the first two cases, so in the third, if the party against whom the decree is passed fails to transfer the property as required by the decree, the transfer may be enforced by proceedings in execution, and this is what actually happened in the present case. The third respondent did not deliver possession to the first and second respondents of the properties allotted to them under the decree until after execution had been taken out against him. Such a transfer cannot be said to be a private transfer within the meaning of S. 64, because the initial step

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which led eventually to the decree was not a suit for partition, but an agreement to refer the question of partition to arbitration. Their Lordships, therefore, consider that the appellant is not entitled to proceed in execution against the properties allotted to the first and second respondents.

In the result, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the first and second respondents before this Board.

Solicitor for appellant: *R. S. Nehra.*

Solicitors for respondents: *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Chilukuri Ramayya ... *Petitioner* (Accused—Petitioner in Cr. M. P. No. 13 of 1932 on the file of the Court of the District Magistrate of Kistna).*

Ramayya, *In re.*

Criminal Procedure Code (V of 1898), S. 476—Complaint under—Finding by Magistrate—Need for statement that prosecution is expedient in the interests of justice.

When a Court seeks to complain under S. 476, Criminal Procedure Code, it is its duty to record a finding that it is expedient in the interests of justice that an enquiry should be made. Where in passing an order under Ss. 195-B and 476 of the Code the Magistrate stated the reason for the complaint to be that the accused "perjured himself on an important fact touching the issue in question,"

Held, that the finding recorded did not satisfy the requirements of the Code.

In re *Yerneni Satyanarayana,* (1928) 28 L. W. 774, *Chaduvula Munuswami Naidu* v. *Emperor,* A.I.R. 1928 Mad. 783 and *Surendra Nath Jana* v. *Kumeda Charan Misra,* (1930) 51 C. L. J. 208, referred to.

Namberumal Chetty v. *Namiappa Mudali,* (1930) I. L. R. 54 Mad. 331: 59 M. L. J. 850, distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Kistna, dated 28th April, 1932, in Cr. M. P. No. 13 of 1932 presented to set aside the

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* Cr. R. C. No. 480 of 1932. (Cr. R. P. No. 446 of 1932.)

26th July, 1932.

order of the Court of the Sub-divisional Magistrate of Gudivada in Criminal Miscellaneous Petition No. 12 of 1931.

K. Kameswara Rao and *C. Krishnachandra Moulesvar* for petitioner.

K. N. Ganapathi for the *Public Prosecutor* (*L.H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER.—The Sub-divisional Magistrate of Gudivada passed an order purporting to be under Ss. 195-B and 476, Criminal Procedure Code, that the present petitioner should be prosecuted for perjury under S. 195, Indian Penal Code. He accordingly forwarded the records to the District Magistrate, Kistna, for taking action against the petitioner under the above section. It is hardly the procedure contemplated in the Code as revised in 1923 and the Sub-divisional Magistrate ought to have complained under S. 476 a point which was taken up on appeal to the District Magistrate who found that the Sub-divisional Magistrate's proceedings were practically a complaint and that the petitioner had not been in any way prejudiced. The point which is now taken in revision against the District Magistrate's order is not quite the same. It is now complained that the Sub-divisional Magistrate erred in not recording a precise finding that it was expedient in the interests of justice that an enquiry should be made into the offence. It might be possible to argue when the Sub-divisional Magistrate records in these terms "Further I find that he perjured himself on an important fact touching the issue in question regarding possession I therefore consider etc." that he was in effect giving his opinion that a prosecution was expedient in the interests of justice. But considering the clear language of the Code we are not disposed to admit any argument of that sort. The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made and therefore Courts will be well advised always to make a record to that effect if that is their opinion; because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they mean something which they have not written. We therefore allow the petition and remit these proceedings to the Sub-divisional Magistrate of Gudivada for such action as he deems necessary in the light of

Ramayya, *In re.*

the above remarks. If he wishes to regularise the complaint at this stage there is no legal objection to his doing so.

In regard to the case-law on the subject it may be noted that our opinion is affirmed by two Judges of this Court in *Chaduvula Munuswami Naidu* v. *Emperor*[1], In re *Yerneni Satyanarayana*[2] and also in *Surendra Nath Jana* v. *Kumeda Charan Misra*[3]. The ruling in *Namberumal Chetty* v. *Nainiappa Mudali*[4] was based on the special wording of the order then in question. The learned Judges there observed that the order was very detailed and comprehensive.

B. V. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Krishna Kurup and another ... *Appellants** (*Defendants*)

v.

Mammad and others ... *Respondents* (*Plaintiffs*).

Krishna Kurup *v.* Mammad.

Civil Procedure Code (V of 1908), O. 2, R. 2—Applicability—Mortgage and lease—Same transaction but obligations being distinct—Prior suit by mortgagee-lessor for arrears of rent—Second suit for mortgage amount and subsequent arrears of rent—Bar.

A usufructuary mortgage of the mortgagor's kanom kuzhikanom interest in certain gardens held under a jenmi provided for three years' possession by the mortgagee, during which period he was to pay the jenmi's michavaram and appropriate the balance of the income in lieu of interest at six per cent. on the principal. It further provided that after the period of three years the mortgagee was to receive the principal amount and surrender the property, and if the mortgagor failed to redeem that the mortgagee might continue in possession on the same terms. The mortgagor was also given the right, if he was unwilling to continue in possession as above, to realise the mortgage amount by bringing to sale the mortgagor's right over the property and the mortgagor bound himself personally to pay any balance left unrealised by the sale. By an arrangement called "*marupat*" executed on the same day as the mortgage, the mortgagor took back possession of the property on lease for three years at a specified rent, part of which was to be paid to the jenmi as michavaram and the remainder to be paid to the lessor as interest on the mortgage amount. The lease provided for interest on the arrears of rent and also that such arrears should be a charge on the equity of redemption. The mortgagor having fallen into arrears in respect of the rent payable under the lease, the mortgagee sued and obtained a decree for the arrears of rent. The mortgagee sued later on to recover the mortgage amount and the subsequent arrears of rent.

Held, that though forming parts of the same transaction the obligation under the mortgage and that under the lease were independent, and that the

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* S. A. No. 1630 of 1928. 12th February, 1932.

1. A. I. R. 1928 Mad. 783
2. (1928) 28 L. W. 774.
3. (1930) 51 C. L. J. 208.
4. (1930) I. L. R. 54 M. 331: 59 M. L. J. 850.

later suit was not barred by the provisions of O. 2, R. 2, Civil Procedure Code.

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Kishan Narain v. *Pala Mal*, (1922) L. R. 50 I. A. 115: I. L. R. 4 Lah. 32: 44 M. L. J. 123 (P. C.), *Muhammad Hafiz* v. *Mirza Muhammad Zakariya*, (1921) L. R. 49 I. A. 9: I. L. R. 44 All. 121; 42 M. L. J. 248 (P.C.), *Muhammad Hussain* v. *Abdul Ghafur Khan*, (1921) I.L.R. 3 Lah. 1, *Ralia Ram* v. *Amir Chand*, (1922) I. L. R. 4 Lah. 52 and *Ramarayanimgar* v. *Maharajah of Venkatagiri*, (1920) I. L R. 44 M. 301: 40 M. L. J. 236, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 151 of 1927 (A. S. No. 492 of 1927, District Court, North Malabar) preferred against the decree of the Court of the Additional District Munsif of Tellicherry in O. S. No. 517 of 19 6.

P. Govinda Menon for appellants.

V. P. Karunakaran Nambiar and *M. C. Sridharan* for respondents.

The judgment of the Court was delivered by

Krishnan Pandalai, J.

Krishnan Pandalai, J.—This second appeal arises from a suit to recover by sale of the mortgaged property and from the 1st defendant personally Rs. 747-10-4, made up of Rs. 600, the principal due on a mortgage and Rs. 147-10-4, arrears of rent with interest thereon due under a contemporaneous counterpart of a lease (*marupat*) both executed by the 1st defendant to the plaintiffs' predecessor-in-title. The defendants' chief contentions were : (1) that the personal remedy was barred by limitation, which both the Lower Courts upheld and which is no longer in question, and (2) that the claim is barred by O. 2, R. 2 of the Code of Civil Procedure, which both Courts overruled and which the defendants press again in this second appeal.

The mortgage, Ex. A, is a usufructuary mortgage, dated 6th March, 1915, for Rs. 600 of the mortgagor's kanom kuzhikanom interest in three gardens held under a jenmi. It provided for three years' possession by the mortgagee during which he was to pay the jenmi's michavaram and obtain receipts and appropriate the balance of the income in lieu of interest at six per cent. on the principal. After the period of three years the mortgagee was to receive Rs. 600 and surrender the property. If the mortgagor failed to redeem at the end of the period, the mortgagee could continue in possession till he was paid off, paying the jenmi's michavaram and appropriating the balance for interest on the

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principal amount. If the mortgagee was unwilling to continue in possession as above, he was given the right to realise the mortgage amount by bringing to sale the mortgagor's rights over the property and the mortgagor bound himself to personally pay any balance left unrealised by the sale.

It will be noticed that there is no covenant by the mortgagor to pay interest as such either during the period of three years or after. The only method by which the mortgagee could get any interest is by taking possession and appropriating the balance of the income after payment of the jenmi's michavaram. By an arrangement very common in Malabar, where the cultivator especially of cocoanut gardens clings with great attachment to possession so as to keep the trees he has planted under his own eye and not hand them over to another whose interest in them is only temporary and mercenary, the mortgagor on the same day as the mortgage, 6th March, 1915, took back the possession given under the mortgage by Ex. B called a '*marupat*' which means counterpart of a lease. Ex. B states that the mortgagor has taken back the possession of the property to be held on *pattom* (lease) for three years. The lessee binds himself to hold this property for three years at an annual rent of Rs. 64 out of which he agreed to pay Rs. 28 to the jenmi as michavaram and hand over the receipts to the lessor and also pay the remainder of Rs. 36 to the lessor as interest on the mortgage amount and obtain the lessor's receipts for the payments. Ex. B also provides that if the rent remains in arrears it is to bear interest at 12 per cent. per annum and also that arrears of rent should be a charge on the equity of redemption.

It is admitted that both documents were parts of the same transaction in the sense that they were brought into existence by an arrangement made at the same time for a common purpose. The mortgagor has remained in possession ever since the mortgage and lease. As he fell into arrears of the rent provided in Ex. B, the mortgagee brought a suit O. S. No. 435 of 1923 and obtained a decree. This suit was brought in 1926 for Rs. 600 due under Ex. A and for subsequent arrears due under Ex. B.

The appellants' (defendants') contention is that on the date of the former suit in 1923 the plaintiff had the right to sue for the principal under Ex. A, that the payments under Ex. B are

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really and substantially for interest, and that as the plaintiff failed to sue for the principal in the former suit after it became due, the present suit for it is barred under O. 2, R. 2, as it is a claim arising on the same cause of action as that on which the former suit was founded. Both the Lower Courts have overruled this contention.

The principle on which cases of this class fall to be decided was explained by the Privy Council in *Kishan Narain* v. *Pala Mali*[1]:

> "If a mortgage deed provides for the payment of principal and interest as independent obligations, O. 2, R. 2 of the Code of Civil Procedure does not preclude the mortgagee from suing to recover the principal by reason of his having previously sued for a personal decree for the interest due. But in the case of a mortgage deed which upon a default in the payment of interest gives the mortgagee the right to realise both the principal and interest, if the mortgagee, upon a default occurring, sues to realise the interest from the property, the rule above referred to precludes him from afterwards suing to realise the principal due, even if by his plaint in the first suit he has purported to reserve the right to do so."

In that case and in *Muhammad Hafiz* v. *Muhammad Zakariya*[2] the mortgages were simple mortgages containing default clauses giving the mortgagee the right to sue for the principal on default of payment of interest on the stipulated dates. Even in such cases, if according to the deed there are independent obligations for the payment of principal and interest, the mortgagee is not debarred by O. 2, R. 2, by suing for a personal decree for interest alone from suing subsequently for the principal. The question in such cases therefore does not depend on whether the agreement for interest and principal is expressed in one or more documents or whether the documents, if more than one, all arose out of one transaction. The document or documents must be examined to see whether the obligation on which the former suit for interest was based was independent of that on which the subsequent suit is brought.

In this case the obligation to pay principal and that to pay rent which was the equivalent of interest, arose independently of each other. The mortgage being usufructuary, in the absence of a special covenant to pay, there would ordinarily be no personal obligation on the mortgagor's part to repay the principal, nor would the mortgagee be entitled to sue for sale. The plaintiffs' right in this case to sue for sale for the principal is entirely due to the special covenant to that effect in the mort-

1. (1922) L. R. 50 I. A. 115: I. L. R. 4 L. 32: 44 M. L. J. 123 (P. C.).
2. (1921) L. R. 49 I. A. 9: I. L. R. 44 All. 121: 42 M. L. J. 248 (P.C.).

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gage deed. As for interest, the mortgage deed does not provide at all for it, because the mortgage being usufructuary, the mortgagee was to be in possession and appropriate the income in lieu of interest. The defendants' obligation to pay the income arose entirely out of the lease back by which he engaged to hold the property as lessee and his payments under the lease are legally payments of rent. Neither the fact that these payments if made would be appropriated by the lessor-mortgagee towards interest for which as such the mortgage did not provide, nor the fact that if the payments were not made, they would be charged on the equity of redemption can change the legal character of the payments. There is no provision in either of the two documents making the right of the mortgagee to sue for the principal depend in any manner on the failure of the mortgagor-lessee to pay the rents regularly. It cannot be doubted that after the expiry of the three years of the lease, the plaintiff was entitled to take back possession even if the rents were being regularly paid, and to enjoy the property either by himself or through another lessee; nor can it be doubted that after the three years the plaintiff would be entitled to sue for sale and realise the principal even if the plaintiff had taken back possession and there could therefore be no question of the defendants being in default of rent. These considerations show that the former suit was brought on an obligation or cause of action with which the right of suit for the mortgage money had no legal connection and that the present suit so far as it is for principal is founded on the right of suit provided by the mortgage deed and so far as it is for rent for a period subsequent to the old suit on the lease. Neither of these claims can be said to be included in the cause of action for the old suit which was for rent till then due.

The above view is supported by the decision in *Muhammad Hussain* v. *Abdul Ghafur Khan*,[1] in which the facts were similar. To the same effect is *Ralia Ram* v. *Amir Chand*[2]. In both these cases it was held that the institution of the former suit based on the lease was no bar to a subsequent suit based on the mortgage and the observations in *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu*[3] were distinguished. In the latter case there was a usufructuary

1. (1921) I. L. R. 3 Lah. 1. 2. (1922) I. L. R. 4 Lah. 52.
3. (1903) I. L. R. 26 Mad. 662.

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mortgage and a lease back. The mortgage provided for repayment at the rate of Rs. 65-10-0 per month made up of Rs. 35 for principal and Rs. 30-10-0 for interest at 14 annas per cent. The mortgagee was to pay himself the interest at the above rate by letting out the property and if the rents derived fell short the mortgagors bound themselves to pay the deficiency every month. The mortgage deed also provided for compound interest on the monthly payments in arrears. By the lease back of even date the mortgagors took back the property as tenants at a rent of Rs. 30-10-0 per month agreeing to pay compound interest on rent in arrears at the rate mentioned in the mortgage deed and also agreeing to surrender possession of the property on thirty days' notice. The mortgagors made some payments but fell into arrears and remained in possession when the suit was brought for the recovery of the principal amount and interest at the agreed rate. Boddam, J., on the Original Side dismissed the suit holding that the mortgage was a purely usufructuary one which did not give the plaintiff the right of suing either for principal or for interest and that the plaintiff having been given legal possession under the mortgage and let out the property to the mortgagors as tenants had only himself to thank if he did not recover possession from his tenants. In appeal a Bench of three Judges held that the mortgage and the lease back should be read together to determine the rights of the parties and so read the mortgage did contain a covenant to pay principal and interest in instalments and also conferred a power on the mortgagee to take possession of the mortgaged property and apply the usufruct in the discharge of interest and principal. They therefore awarded the plaintiff a decree. That decision was not concerned with the effect of O. 2, R. 2, but only with the construction of the mortgage then in question. It is only an application of the rule that where there are several contemporaneous documents evidencing a transaction, they must all be read together for determining the rights of the parties. In this connection reference may be made to *Ramarayanimgar* v. *Maharajah of Venkatagiri*,[1] where in a case of a usufructuary mortgage and lease back where the lease contained a clause making the arrears of rent a charge on the mortgaged and other property it was held that the rights under the mortgage

1. (1920) I. L. R. 44 M. 301: 40 M. L. J. 236.

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and those under the lease are so far distinct from each other as to entitle the mortgagor to redeem the mortgage on payment of the principal sum due on the mortgage deed without at the same time having to pay the arrears of rent though charged on the equity of redemption. That would seem to supply the test whether the two obligations are one or independent so as to constitute the same or different causes of action. If in this case the defendant-mortgagor is, as he appears to be, entitled to redeem the plaintiff's mortgage and to recover possession on payment of Rs. 600 without having at the same time to pay whatever arrears of rent may be due by him though charged on the equity of redemption (for which latter amount the plaintiff's remedy would be by a separate suit) it is impossible to contend that the plaintiff's old suit on the lease can operate as a bar under O. 2, R. 2, to the present one.

The appellant however referred to two later cases from Lahore, viz., *Rala Ram* v. *Diwan Chand*[1] and *Diwan Chand* v. *Ralla Ram*[2]. In the latter case the usufructuary mortgage, dated 29th April, 1914, was for Rs. 1,000 for a term of 18 months and the lease back of the same date was for a period of 11 months for a monthly rent of Rs. 4. In June, 1917, the mortgagor being still in possession as tenant, the mortgagee brought a suit for Rs. 120 claimed as arrears of rent. Only Rs. 4 was decreed, the rest of the suit being dismissed on the ground that the tenancy had expired at the end of 11 months. In May, 1919, the mortgagee brought a suit for Rs. 1,256 being the principal amount of Rs. 1,000 and the balance claimed as arrears of interest. That suit was dismissed as barred under O. 2, R. 2, a decision which was upheld by the Lahore High Court in February, 1921. Then the mortgagee brought a third suit claiming possession and the question was whether the suit for possession was affected by O. 2, R. 2, and it was held that it was. That is not the present question which is whether the mortgagee's second suit in that case for money was so affected. All that the cited decision says about that matter is that the ground of decision was that the two deeds should be read together. This is of no help to us in deciding the present case. We are not prepared to follow the other decision cited as it does not appear to give sufficient weight to the consideration whether though forming parts of the same transaction the

1. A. I. R. 1921 Lah. 225. 2. A. I. R. 1926 Lah. 559.

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obligation under the mortgage and the obligation under the lease are, having regard to the intention of the parties, to be treated as independent. If so, the fact that they arose out of the same transaction would not attract the bar under O. 2, R. 2. See *Payana Reena Saminathan* v. *Pana Lana Palaniappa*[1] where the Privy Council said that the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction. In this case we have no doubt that the arrangement whereby the mortgagor was to remain in possession as lessee under the mortgagee was one intended to benefit the mortgagor himself and the agreement to pay rent was therefore as much in his own interest as in that of the mortgagee. The attempt to make use of O. 2, R. 2 in this connection is to convert what was intended as a shield into a sword.

The second appeal fails and is dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Chingurupati Venkatasubba Rao and another .. *Petitioners** (*Accused*)

v.

Naraharisetty Anjaneyalu .. *Respondent* (*Complainant*).

Venkatasubba Rao v. Anjaneyalu.

Criminal Procedure Code (V of 1898), *Ss.* 4 (*h*), 157, 173, 190 *and* 436—*Complaint of kidnapping—Referred charge-sheet by Police—No offence to constitute a report—Sub-divisional Magistrate's order directing Police to file charge-sheet—Police filing charge-sheet—Successor as Sub-divisional Magistrate—His order to treat the case as one of civil nature—Application to Sessions Judge to revise the order—Whether Sub-divisional Magistrate's order to file a charge-sheet amounted to taking cognisance by Court.*

Where a complaint of kidnapping having been originally made to the Police, the Police sent a referred charge-sheet to the Sub-divisional Magistrate who ordered the Police to put in a charge-sheet and in reply the Police again put in a referred charge-sheet and in the meanwhile the Sub-divisional Magistrate who had passed the order was succeeded by another who directed the case to be treated as one of a civil nature and an application to revise the order was made before the Sessions Judge who ordered further enquiry into the complaint and the matter really turned upon the question as to whether the Sub-divisional Magistrate who directed the Police to put in a charge-sheet took cognizance of the case or not,

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*Cr R. C. No. 89 of 1932. 6th April, 1932.
(Cr. R. P. No. 84 of 1932.)

1. (1913) L. R. 41 I. A. 142

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Held, that the order of the Sub-divisional Magistrate directing the Police to put in a charge-sheet did not amount to taking cognizance of the offence. His successor therefore in dealing with the matter when the Police again sent up a charge-sheet was in the same position as if he had been dealing with the original report of the Police and his order directing the case to be treated as one of civil nature was not subject to revision by the Sessions Court.

A Police referred charge-sheet, where, as in this case, it is reported that there has been no offence committed cannot possibly be called a report on facts which constitute such offence.

High Court Proceedings, (1878) 2 Weir 119 and (1875) 2 Weir 246 and Criminal Revision Case No. 162 of 1895, referred to.

Mere application of the Magistrate's mind to a case will not amount to taking cognizance of the offence. *Emperor* v. *Sourindra Mohan Chuckerbutty*, (1910) I. L. R. 37 C. 412, distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, West Godavari Division, at Ellore, dated 31st October, 1931 and made in Criminal Revision Petition No. 12 of 1931 (Referred Charge-sheet No. 3 of 1931, Sub-divisional Magistrate, Ellore).

K. S. Jayarama Aiyar and *G. Gopalaswami* for petitioners.

K. C. Nambiar and *A. S. M. Nair* for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise an order of the learned Sessions Judge of West Godavari directing further enquiry into a complaint of kidnapping. This complaint of kidnapping had been originally made to the Police on 15th March, 1931. The Police sent a referred charge-sheet to the Sub-divisional Magistrate who ordered the Police to put in a charge-sheet. In reply to this the Police again put in a referred charge-sheet; meanwhile the Sub-divisional Magistrate who passed the order directing a charge-sheet to be put in was succeeded by another. The latter agreed with the Police and by his order on 27th June, 1931, directed the case to be treated as one of a civil nature. An application to revise this order was made before the Sessions Judge who ordered further enquiry into the complaint and it is against this order that this revision petition has been filed.

The matter really turns upon the question as to whether the Sub-divisional Magistrate who directed the Police to put in a charge-sheet took cognizance of the case or not. The view of the learned Sessions Judge was that he took cognizance and

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that therefore the case could not be disposed of by the order of his successor accepting the referred charge-sheet and remained pending. It is agreed both by Mr. Jayarama Aiyar who argued the case for the petitioner and by Mr. Bewes for the Crown—and it is quite obvious—that the order directing the Police who had put in a referred charge-sheet to put in a charge sheet was not a legal order. The Police must be allowed to form their own opinion of a case when submitting their report and a Magistrate cannot ask them to change their opinion merely because he does not agree with them. In this case the Police were quite entitled to do what they subsequently did, and I think they were right, when they still entertained their former opinion, to submit another referred charge-sheet instead of a charge-sheet. It is clear from the Code and is not disputed that there are only two matters which the Sessions Judge can revise; under S. 436, Criminal Procedure Code, he can direct further enquiry to be made into any complaint which has been dismissed under S. 203 or sub-sec. (3) of S. 204, or into the case of any person accused of an offence who has been discharged.

The first point urged for the petitioner is that there was no complaint before the Magistrate. With that contention I agree. There are only three ways in which a Magistrate can take cognizance of an offence and they are described in S. 190, Criminal Procedure Code:

"(a) upon receiving a complaint of facts which constitute such offence; (b) upon a report in writing of such facts made by any police officer; and (c) upon information received from any person other than a police officer, or upon his own knowledge, or suspicion, that such offence has been committed."

Admittedly neither (*a*) nor (*c*) applies to this case. Turning to (*b*), the words "such facts" have to be read with clause (*a*), that is, as being "facts which constitute such offence". A Police referred charge-sheet, where, as in this case, it is reported that there has been no offence committed cannot possibly be called a report on facts which constitute such offence. The learned Sessions Judge has relied on three rulings in 2 Weir—one case reported in 2 Weir 119 and two in 2 Weir 246. It may be noted that none of these cases decided the matter in question. In the first case what was actually decided was that a Magistrate who agreed with the view of a complaint taken by the police officers that there was

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no sufficient ground for launching an investigation need not send for and examine the complainant before dismissing the complaint. That is still good law, if we use "complaint" as meaning complaint to the Police. But the remark relied on and which finds a place in the heading is that a Police report (apparently of this sort) would give jurisdiction to a Magistrate to enter upon an enquiry. This decision however was under the Code of 1872. There is no definition there of "complaint" and the section which was being dealt with—S. 141—ran

"A Magistrate may entertain a complaint of an offence, whether preferred directly by the complainant, or on report of a police officer, and may issue process, in the manner hereinafter prescribed, to compel the appearance of persons accused of such offences."

In S. 4 (*a*) of the Code of 1882 the word "complaint" was first defined and that definition stands also in the Code of 1898 as amended, S. 4 (*h*), which runs:

"'complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer".

Hence the *obiter* remarks in 2 Weir 119 are not applicable to cases under the present Code. The next case is 2 Weir 246—H. C. Proceedings, dated 24th July, 1875, No. 1552. What was held there was that a complaint made in the form of a police report may be dismissed without examining witnesses, if the facts stated in the report constitute no offence. That is still good law. This was again under the Code of 1872 and the *obiter* remarks are therefore no authority in the matter now under consideration. The next case is on the same page—Criminal Revision Case No. 162 of 1895. It follows the previous cases on the same point and says that if the complaint had been made by a Police charge-sheet it was unnecessary to examine the complainant. I think it is clear that the word "complaint" here is loosely used, particularly as the judgment is very brief and is rested upon the two cases quoted above.

The learned Public Prosecutor did not dispute that there was a referred charge-sheet by the Police which did not constitute a complaint; but he argued that, though the Sub-divisional Magistrate's order, dated 25th April, 1931, which directed a charge-sheet to be filed was not correct, yet the force of the whole order amounted to the Court taking cognizance.

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As observed in *Ananta Ram Tewary* v. *Sheikh Altab Sarkar*[1] the expression "to take cognizance" has not been defined in the Criminal Procedure Code and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken. The learned Sessions Judge relied on *Emperor* v. *Sourindra Mohan Chuckerbutty*[2] where it is said that "taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." The facts of that case are different from those of the present case. In that case there had been a transfer of the case from the Sub-divisional Magistrate to the Headquarters Magistrate. That transfer necessarily implied taking cognizance of the offence. I will set out the order of the Sub-divisional Magistrate in the present case, dated 25th April, 1931. It runs :

> "The parties are Hindus. Under Hindu Law the father is the lawful guardian of his children. A mother cannot claim right to the custody of her legitimate children adversely to the father. As matters stand two persons are alleged to have taken away the child without the consent of the guardian (father) in whose custody the child was on the date of the offence. What their defence is, is not the consideration. The general trend of the evidence recorded is also in favour of the prosecution story. There can be no question of civil dispute in a case of this sort. The S. H. O. is therefore directed to file a charge-sheet in this case."

No doubt in the words of *Emperor* v. *Sourindra Mohan Chuckerbutty*[2] the Magistrate applied his mind to the case to a certain extent, but what he really did may be interpreted in one of two ways : he either told the Police, "Think again and see if you cannot come to a different conclusion"; or else he meant, "I will take cognizance if you file a charge-sheet". It does not appear to me that either of these actions of the Magistrate by which he referred the matter to the Police for a fresh final report can be called "taking cognizance". Although the terms "charge-sheets" and "referred charge-sheets" are in constant use, it is well known that no such terms are to be found in the Criminal Procedure Code and even when it was amended in 1923 nothing was done to bring the practice into closer contact with the Procedure Code itself. The Code does of course provide for one sort of referred charge-sheet; that is where the Police see no sufficient grounds for

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1. (1913) 17 C. W. N. 795. 2. (1910) I. L. R. 37 C. 412.

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investigation. This falls under S. 157 (1) (*b*), which says,

"if it appear to the officer in charge of a police station that there is no sufficient ground for entering on an investigation he shall not investigate the case".

This is followed by a proviso that

"in each of the cases mentioned in clauses (*a*) and (*b*) of the proviso to sub-section (1), the officer in charge of the police station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, and in the case mentioned in clause (*b*), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated".

This obviously does not meet the contingency in which the Police have investigated and find the complainants' case not made out or the offence undetectable. Although S. 173 which deals with the final report of the Police, does not appear to contemplate anything but a report which leads to trial if the Magistrate approves of it, nevertheless, as the Police must send a report after investigation in every case, there is no other section under which a referred charge-sheet after investigation can be brought. I cannot therefore agree with the argument of the petitioner that S. 173 does not apply to a referred charge-sheet. It is well settled now that when the Police refer a case as false and the Magistrate orders it to be so treated this is not a judicial act. A complaint by the Court is not required to prosecute a complainant for making such a false complaint to the Police under S. 211 (vide *Bhimaraja Venkateswarulu* v. *Moova Bapula*,[1] which has been confirmed by a Full Bench) and such an order is admittedly not revisable by the Sessions Judge under S. 436. From this it is fair to argue that any order other than proceeding under S. 203 by sending for the complainant or under S. 204 by issuing process is also not a judicial act, and consequently not capable of revision under S. 436. It is argued that the mere application of his mind by the Magistrate to the case amounted to taking cognizance. But even to accept a referred charge-sheet the Magistrate must apply his mind to the case and this is certainly not taking cognizance. Mere application of his mind will not therefore amount to taking cognizance of the offence.

In my opinion, therefore, the order of the Sub-divisional Magistrate, dated 25th April, 1931, did not amount to taking cognizance of the offence. His successor, therefore, in dealing with the matter when the Police again sent up a referred charge-

1. (1912) 15 I. C. 320.

Venkatasubba Rao *v.* Anjaneyalu.

sheet, was in the same position as if he had been dealing with the original report of the Police, and his order directing the case to be treated as one of civil nature was not subject to revision by the Sessions Court.

The petition is therefore allowed and the order of the learned Sessions Judge is set aside.

K. C. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR GEORGE LOWNDES.

Benoy Krishna Das and others .. *Appellants**

v.

Salsiccioni and others .. *Respondents.*

P. C. — Benoy Krishna Das *v.* Salsiccioni.

Transfer of Property Act (IV of 1882), *Ss.* 106, 110, 116—*"Month of tenancy"—Computation of—Tenant holding over—Notice to quit—Validity of*

The defendant was a lessee for a term of four years commencing from the 1st June, 1921. On the expiry of his lease, he held over as a monthly tenant, his tenancy being thereafter terminable, by virtue of the provisions of S. 116 read with S. 106 of the Transfer of Property Act, by 15 days' notice expiring with the end of a month of the tenancy. On the 1st February, 1928, the defendant gave notice to terminate the tenancy in these terms :—

"We hereby give you one month's clear notice to take effect from to-day. By this you must understand that we shall hold possession of the above premises up to the last day of this month and would shift from here just on the 1st proximo."

Held, having regard to S. 110 of the Act, that the notice to quit on the 1st March, 1928, was valid and effective. The lease of 1921 expired at midnight on the 1st June, 1925, and the notice expired, as required by S. 106, with the end of a month of the tenancy, *viz*, the midnight on the 1st March, 1928.

To exclude the operation of the second clause of S. 110 of the Transfer of Property Act, there must be an *express* agreement to the contrary.

Appeal No. 107 of 1931 from a decree of the High Court of Calcutta, dated the 15th August, 1930, reversing a decree of the said Court in its Original Civil Jurisdiction, dated the 17th April, 1930.

The main question on the appeal was as to the validity of a notice, dated 1st February, 1928, given by the respondents to quit their tenancy.

Both Courts in India held that the notice should be read as a notice to quit on the 1st March, 1928, and the Trial Judge held that

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*P. C. Appeal No. 107 of 1931. 26th July, 1932.

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such notice was not a good notice inasmuch as it did not expire with the end of a month of the tenancy, as prescribed by S. 106 of the Transfer of Property Act. The Appellate Bench of the High Court held (differing from the learned Trial Judge) that the monthly tenancy ended at midnight on the 1st of each month, and that the notice to quit was valid and effective.

In the judgment of the learned Chief Justice, with which Mr. Justice C. C. Ghose concurred, he stated :

" The sole question raised before us is whether the notice to quit given by the defendants to the plaintiffs and dated the 1st February, 1928, is valid and sufficient to determine the tenancy . . I think the letter should be read as a notice to quit on the 1st March. In the Small Cause Court the plaint itself alleged that the original lease expired on the 31st May, 1925, and in paragraph 3 of the written statement the defendants admit that the lease expired on the 31st May, 1925. An examination of the indenture itself shows that the lease began 'from' the 1st June, 1921, and was 'for the term of 4 years thence next ensuing'. The circumstance that the date of the lease is the 29th June, 1921, and that the habendum is to some extent retrospective does not make it in my opinion any the less clear that the term created by the indenture did not begin until midnight on the 1st June, 1921, despite the defendant's incautious and inaccurate admission. [*Ackland* v. *Lutley*, (1839) 9 Ad. and El 879 at 894; *Meggeson* v. *Groves*, (1917) 1 Ch. 158; *Savory* v. *Bayley*, (1922) 38 T. L. R. 619].

" As the lessee held over as a monthly tenant under the lease, the date of the commencement of the original term defines the date on which each month's tenancy began and ended. In my judgment the monthly tenancy in this case ended at midnight on the 1st of each month and the notice to quit on the 1st of March was valid and effective."

Against the decree of the High Court, the plaintiffs appealed to His Majesty in Council.

Dunne, K. C. and *McNair* for appellants.

Sir Thos. Strangman for respondents was not called upon.

26th July, 1932. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—Their Lordships do not think it necessary to call upon Counsel for the respondents in this case.

The appellants, who are the plaintiffs in the action, are lessors claiming that a notice given by the respondents purporting to terminate their tenancy was not a good one.

The notice was given in the circumstances which will shortly be mentioned, but before stating them it may be well to refer to the sections of the Transfer of Property Act which are relevant.

The first is S. 106, which is in these terms :—

"In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year

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of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy."

Section 110 is in these terms :—

"Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease. Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences."

Now the facts of this case are as follows :—The respondents became tenants of the appellants under a lease of certain premises, dated the 29th June, 1921, expressed to be "from the first day of June, 1921, for the term of four years thence next ensuing." Then there followed this provision with regard to the payment of rent :—

"Yielding and paying therefor the clear monthly rent or sum of Rupees One thousand such rent to be paid on or before the seventh day of the month succeeding the month for which it is due the first payment being the rent for the month of June One thousand nine hundred and twenty-one to be paid on or before the seventh day of July One thousand nine hundred and twenty-one and so on."

That lease expired in due course in the year 1925, but the respondents continued as tenants of the premises, and under the terms of S. 106, which has been read, their tenancy was terminable thereafter by fifteen days' notice expiring with the end of a month of the tenancy.*

On the 1st February, 1928, the respondents gave notice to terminate, and the notice was, so far as material, in these terms :—

"We hereby give you one month's clear notice to take effect from to-day. By this you must understand that we shall hold possession of the above premises up to the last day of this month and would shift from here just on the 1st proximo. Please take note of the same."

Now it is asserted by the appellants that that notice was bad, because it was a notice which treated the month of the tenancy at the end of which the notice had to expire as midnight of the 1st of March, whereas the month of the tenancy by reference to which the notice had to expire ended, as the appellants contend, at midnight of the 29th February, 1928.

The question depends, first of all, on the date of the expiry of the lease. That date determines the beginning of the respondents' tenancy, which was capable of determination by monthly notice in accordance with S. 106.

*Vide S. 116 of the Act ("Effect of holding over").—K. J. R.

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Turning to the terms of the lease of 1921, and applying to it the language of S. 110 of the Transfer of Property Act, it would appear that the first day of June, 1921, is excluded from the term, because the section says: " Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded". Therefore the 1st of June is excluded.

It further appears that the 1st of June, 1925, is included, because the second portion of S. 110 says : " Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences." Therefore, the 1st of June, 1925, is included, and the lease ended at midnight on the 1st of June, 1925, at any rate unless the argument advanced by Mr. Dunne to the effect that there exists an express agreement to the contrary is well founded.

Mr. Dunne has said that the provision in the lease, "Yielding and paying therefor the clear monthly rent or sum of Rupees One thousand such rent to be paid on or before the seventh day of the month succeeding the month for which it is due," is either itself an agreement which excludes the operation of S. 110 or, at any rate, is a provision which necessarily involves the implication of such an agreement. It clearly is not an agreement expressly excluding S. 110, because it has nothing to do with fixing the period covered by the term. It merely provides for the payment of the rent. Mr. Dunne's argument must really amount to this, that because he suggests there is an inconsistency between the provision with regard to the payment of rent and the provision with regard to the length of the term, there must be implied an agreement to exclude the operation of S. 110.

Now the answer seems to be that the section in terms applies unless there is an express agreement to the contrary, and no express agreement to the contrary can, in fact, be found in the lease in question.

That being so, it must be taken that the lease ended at midnight on the 1st of June, 1925, and that any notice to determine thereafter given must be a notice to quit expiring with the month ending at midnight on the first day of any month. The

notice in fact given on the 1st of February, 1928, clearly is a notice in regard to the 1st of March, 1928, and not in regard to the 29th of February, 1928. It, therefore, is a notice which, in the language of S. 106, expired with the end of a month of the tenancy, because the month of the tenancy expired at midnight on the 1st of March, 1928.

The High Court in its appellate jurisdiction decided in the respondents' favour (in their Lordships' judgment rightly), although they have based their conclusion not upon S. 110, to which their attention does not appear to have been called, but upon the rule of English law which appears from the cases cited to them.

In the result, therefore, their Lordships are of opinion that the appeal fails, and they will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of the appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Sanderson, Lee & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE KRISHNAN PANDALAI.

P. P. V. P. L. Chockalingam Chettiar (deceased) and another .. *Petitioners* (Respondent and his L. R.)*

v.

K. P. S. A.R. Palaniappa Chettiar.. *Respondent (Petitioner).*

Civil Procedure Code (V of 1908), S. 24—"Competent to try"—Meaning of—Suit exceeding small cause jurisdiction of Munsif—Transfer to Munsif—Validity.

The expression "competent to try" in S. 24 of the Civil Procedure Code means "of jurisdiction competent to try".

A small cause suit pending before a Sub-Court can be transferred by the District Judge to a District Munsif even though the value of the suit transferred is beyond the small cause jurisdiction of the Munsif.

Raja Simhadri Appa Row v. *Ramachandrudu*, (1902) I. L. R. 27 M. 63 : 13 M. L. J. 23, referred to.

Murugesa Mudaliar v. *Venkata Kesavalu Chetty*, (1929) 56 M. L. J. 649, doubted.

Per *Krishnan Pandalai, J.*—S. 24 (4) deals only with transfers to a Court not already vested with Small Cause powers. So where a suit is transferred to a Small Cause Court, there is nothing in the sub-section

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* C. R. P. No. 430 of 1930. 15th March, 1932.

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which requires that suits of higher value when transferred should be tried as small cause suits or that there should be no appeal therefrom.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Ramnad at Madura, dated 20th December, 1929 and made in O. P. No. 183 of 1929.

K. S. Desikan for petitioners.

K. V. Venkatasubramania Aiyar for *M. Murugappa Chettiar* for respondent.

The Court delivered the following

Jackson, J.

JUDGMENTS. *Jackson, J.*—A suit valued at Rs. 768 was within the small cause jurisdiction of the Subordinate Judge of Devakotta. The District Munsif of Devakotta was trying a connected suit within his original side jurisdiction. For convenience of parties the small cause suit was transferred by the District Judge of Ramnad to the file of the District Munsif. The petitioner moves this Court to declare, in revision, that the District Judge acted without jurisdiction.

The short point is whether a District Munsif is "competent to try" a small cause suit beyond his small cause jurisdiction and within the small cause jurisdiction of the Subordinate Judge. Because if he is not "competent to try" the District Court could not have transferred the suit to him under S. 24 (1) (*a*), Civil Procedure Code.

Ordinarily a District Munsif would be competent to try a suit valued at Rs. 768; but if his munsifi is included in the jurisdiction of a Subordinate Judge who has been given small cause powers up to Rs. 1,000, then under S. 16, Act IX of 1887 (save as provided by any enactment for the time being in force), he shall not try such a suit, which will be triable only by the Subordinate Judge. Then the question arises, is a Munsif whose hands are tied by S. 16, "competent" to try the suit?

I think there can be no doubt that he is competent, but that particular class of suit is taken from him by special enactment; and, as S. 16 expressly provides, if the special enactment is negatived by some other enactment, then the Munsif can exercise his competence. The matter has been elucidated in a parallel problem arising out of the same term "a Court competent to try" in S. 11, Civil Procedure Code. It was

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argued in *Raja Simhadri Appa Row* v. *Ramachandrudu*[1] that the District Munsif of Gudivada could never by force of S. 16 of the Provincial Small Cause Courts Act take a suit of small cause valuation on to his original side; and therefore a suit which he had decided on the original side could not be treated as *res judicata* when he was trying a small cause suit between the same parties, because the Original Side Court "was not competent to try" the subsequent suit in the Small Cause Court.

The Bench negatived this argument holding that the circumstance of the original jurisdiction being barred does not make the ordinary Civil Court a Court which is not a Court of jurisdiction competent to try the present suit.

The same language may be applied to S. 24 (1) (*a*), Civil Procedure Code. The Court has jurisdiction to try, and is competent to try, though there is the circumstance, or accident, that that particular class of suit is removed from its purview.

It is clear that when S. 24 has been canvassed on other grounds this question has suggested no difficulty to the Courts. Thus in *Sankararama* v. *Padmanabha*[2], when the Subordinate Judge of Tuticorin had small cause jurisdiction covering the munsifi of Srivaikuntam, and the suit was transferred to the Munsif of Srivaikuntam who had not got small cause powers up to the necessary value, this Court has held (page 27) "that both Courts were competent to dispose of the suits cannot be doubted" and the District Court "had power to transfer the suit" (page 31).

Again in *Sukha* v. *Raghunath Das*[3] it is held that the District Court has power to transfer the small cause suit to a Court which is not invested with small cause powers.

This is directly traversed in *Murugesa Mudaliar* v. *Venkata Kesavalu Chetty*[4]. No doubt it is there left open whether *Sukha* v. *Raghunath Das*[3] had gone to this extent, but the passage quoted above from page 219 puts it beyond doubt, and it must be decided whether the Allahabad or the Madras case is right.

1. (1902) I. L. R. 27 M. 63: 13 M. L. J. 23.
2 (1912) I. L. R. 38 Mad. 25 at 27: 23 M. L. J. 373.
3. (1916) I. L. R. 39 All. 214 at 219. 4. (1929) 56 M. L. J. 649 at 653.

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The ruling upon which the Madras case chiefly relies, *Bagiammal, In re*[1], is hardly in point because the City Civil Court by virtue of S. 3 of the Madras City Civil Courts Act (VII of 1892) is quite incompetent to try suits cognizable by the Small Cause Court. There is no precisely similar enactment in regard to District Munsifs, who are competent to try suits of small cause valuation provided that S. 16 of the Provincial Small Cause Courts Act does not apply.

An unreported case cited in *Murugesa Mudaliar* v. *Venkata Kesavalu Chetty*[2] hardly carries the matter further, for there this Court was exercising its own discretion under S. 24, Civil Procedure Code, and nobody suggests that a Court is bound to transfer.

S. 24 clearly contemplates the transfer by a District Court of a suit from a Court of Small Causes. If it is to be said that a small cause suit can only be transferred to a Court having small cause jurisdiction, because otherwise S. 16 of the Small Cause Courts Act will be offended, then sub-clause (4) of S. 24 becomes meaningless. If the Court of transfer is itself always to be a Small Cause Court there can be no question of deeming.

But there is no difficulty if "competent to try" is understood as in *Raja Simhadri Appa Row* v. *Ramachandrudu*[3], to mean "of jurisdiction competent to try". S. 24 must then be understood to constitute an enactment saving, in special circumstances, the provision of S. 16 of the Small Cause Courts Act.

Of course it is a question of convenience. When a District Munsif is trying an original suit of Rs. 1,400 value, and a connected suit of Rs. 700 value is before the Subordinate Judge in his small cause jurisdiction, it would be inconvenient to insist on two separate trials because of a hard and fast rule against concurrent jurisdiction. Therefore S. 16, Small Cause Courts Act, is made elastic by S. 24, Civil Procedure Code. Whenever to avoid rigidity a certain discretion is given to the Courts ingenious persons can imagine that discretion being carried to staggering lengths, and in the case-law which has clustered round S. 24 words like "disastrous" and "curious" will be found. But it is hardly the business of Courts to save the

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1. (1917) 32 M. L. J. 258. 2. (1929) 56 M. L. J. 649 at 653.
3. (1902) I. L. R. 27 Mad. 63 : 13 M. L. J. 23.

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Legislature from itself, and, at any rate in this matter, it is sufficient to point out the clear meaning of the section.

Therefore it cannot be said that the learned Judge acted with any irregularity and the petition is dismissed with costs.

Krishnan Pandalai, J.

Krishnan Pandalai, J.—I agree that the petition should be dismissed. Perhaps I may add that the difficulties felt in working sub-clause (4) of S. 24 of the Code of Civil Procedure are of two kinds. First, where a small cause suit is transferred to a Court which is not vested with any small cause jurisdiction, the latter Court is to be deemed for the purpose of the transferred suit to be a Court of Small Causes. This, it appears to me, is the proper meaning and effect of that clause. But it has been thought that it means that, where a suit is transferred to a Court which, as all Munsifs' Courts are in this Presidency, is already invested with small cause jurisdiction up to a certain limit (Rs. 100 or Rs. 300), that Court should try the transferred suit as a small cause suit though of higher value than its small cause jurisdiction and that as a consequence there should be no appeal from such a decree; though, if it were not a transferred case, there would have been an appeal. To this latter difficulty, if it is really a greater one than the first difficulty abovementioned, I would venture to suggest that on a proper construction of sub-clause (4) it does not deal with transfers to a Court already invested with small cause powers. The word "deemed" seems to indicate that it deals only with transfers to a Court without such powers. Therefore, where a suit is transferred to a Small Cause Court, there is nothing in the sub-section which requires that suits of higher value when transferred should be tried as small cause suits or that there shall be no appeal therefrom. This point, however, does not arise in the present petition which only raises the question of the power of transfer to a Court which has small cause jurisdiction of a suit of higher value than such jurisdiction. I agree that the main part of the section clearly authorises such transfer.

S. R. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT :—LORD WRIGHT, SIR LANCELOT SANDERSON AND SIR DINSHAH MULLA.

Mohammad Aslam Khan and others .. *Appellants**

v.

Khan Sahib Mian Feroze Shah .. *Respondent.*

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Specific Relief Act (I of 1877), S 27 (b)—*" Transferee without notice"—Constructive notice of prior agreement.*

Where a transferee for value has knowledge of such facts which would put him upon enquiry which, if prosecuted, would have disclosed a previous agreement to sell in favour of another person, such a transferee is not a " transferee without notice of the original contract " within the meaning of the exception in S. 27 (*b*) of the Specific Relief Act.

Appeal No. 79 of 1931, by special leave, against (1) an order, dated the 18th January, 1930, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, amending a decree, dated the 11th November, 1925, of the same Court; (2) the amended decree of the same Court, dated the 18th January, 1930; and (3) an order, dated the 26th June, 1930, of the same Court, in execution granting mesne profits to the respondent.

The main question for determination on the appeal was whether under the Specific Relief Act, 1877, S. 27 (*b*), the appellants, who claimed to be subsequent purchasers for value without notice, were entitled to the protection afforded by clause (*b*) of that section. The facts of the case are sufficiently fully set out in their Lordships' judgment.

Dunne, K. C. and *J. M. Pringle* for appellants.—The burden of proof lay on the plaintiff-respondent to establish that we had notice of the prior agreement of sale: *Official Receiver* v. *P. L. K. M. R. M. Chettyar Firm*[1].

De Gruyther, K. C. (with *Parikh*) for respondent.—The appellants must be deemed to have had notice. Wilful abstention from an enquiry is tantamount to constructive notice. Refers to the definition of notice in S. 3 of the Transfer of Property Act, and to *Baburam Bag* v. *Madhab Chandra Pollay*[2], *Himatlal Motilal* v. *Vasudev Ganesh*[3], *Gobind Chunder Maokerjee* v. *Doorgapersaud Baboo*[4] and *Varden Seth Sam* v. *Luckpathy Royjee Lallah*[5].

Dunne, K. C. replied.

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*P. C. Appeal No. 79 of 1931. 24th June, 1932.

1. (1930) L. R. 58 I. A. 115: I. L. R. 9 R. 170: 60 M. L. J. 652 (P.C.).
2. (1913) I. L. R. 40 C. 565 at 569.
3. (1912) I. L. R. 36 B. 446.
4. (1874) 22 W. R. 248 at 252.
5. (1862) 9 M. I. A. 303 at 322, 323.

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Sir Lancelot Sanderson.

24th June, 1932. Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by special leave from a judgment and decree of the Judicial Commissioner of the North-West Frontier Province, dated the 18th January, 1930, amending a decree, dated the 11th November, 1925, as well as from the decree as amended and the subsequent order, dated the 26th June, 1930, in execution granting mesne profits to the plaintiff-respondent.

The suit was brought on the 12th May, 1922, by the plaintiff, K. S. Mian Feroze Shah in the first instance against Mohammad Afzal Khan praying for a decree for possession of certain lands in the villages of Ahmedabad and Narai by specific performance of an alleged agreement, dated the 1st May, 1921, by means of the execution and registration of a sale deed and for the recovery of the sum of Rs. 4,520 and for such other and further relief as the Court might deem equitable.

The defendant, Mohammad Afzal, pleaded in his written statement, among other pleas, that he had parted with his rights and possession in the lands in the said village of Ahmedabad to M. Aslam Khan, Musammat Khaperai and Musammat Mashala.

Consequently the three last named persons were added as defendants.

They are the appellants in this appeal, and they will hereinafter be referred to as the appellants.

Attar Singh, who was alleged to be a mortgagee, was added as a defendant, but it appears that the District Judge decided not to deal with the rights of the alleged mortgagee but to confine his decision to the case against the appellants. The alleged mortgagee has not been represented in this appeal and no question as to his rights has been raised before their Lordships.

The learned District Judge of Peshawar decided that the plaintiff was not entitled to specific performance of the alleged contract but that he was entitled to recover from the defendant Mohammad Afzal the sum of Rs. 53,900, which he held the defendant Mohammad Afzal had borrowed from the plaintiff.

The plaintiff appealed against the District Judge's judgment and decree to the Judicial Commissioner of the North-West Frontier Province, who, on the 11th November, 1925,

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allowed the appeal, set aside the decree of the District Judge and granted to the plaintiff a decree for specific performance of the agreement, dated the 1st May, 1921, against the defendant Mohammad Afzal in respect of the lands mentioned in the Judicial Commissioner's decree. He made no order as to the recovery of the sum of Rs. 4,520, on the ground that it had not been demanded in the appeal. No appeal has been filed by the plaintiff against the Judicial Commissioner's order as to the sum of Rs. 4,520, and their Lordships need not refer to this matter again.

The Judicial Commissioner ordered that the costs of the appeal should be paid by Mohammad Aslam Khan, Musammat Khaperai and Musammat Mashala only. It is to be noted that although the appellants were added as defendants in the suit, the plaint was not amended, and that consequently no relief was prayed against them, that the Judicial Commissioner's decree granted specific performance of the contract against the defendant Mohammad Afzal only, and that although no relief was granted against the appellants, they were directed to pay the costs of the appeal.

The decree of the Judicial Commissioner, to say the least of it, may be described as inconsistent. In January, 1926, the plaintiff applied to the District Judge for execution of the abovementioned decree, the application was to the effect that all the defendants in the suit should execute and get registered a sale deed in favour of the plaintiff and should deliver possession of the lands in suit.

The appellants applied to the Judicial Commissioner for leave to appeal to His Majesty in Council against his decree of the 11th November, 1925, and leave was granted in October, 1926. Execution of the decree was stayed on the condition that the appellants should give security for mesne profits of the lands during the period of the pendency of the appeal.

The appellants did not proceed with their appeal to His Majesty in Council, which was dismissed for want of prosecution on the 21st December, 1928.

It was alleged by the appellants, but not proved, that the reason for their not proceeding with the appeal to His Majesty in Council, was that they were advised that the relief granted by the Judicial Commissioner in the decree of the 11th

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November, 1925, was against Mohammad Afzal only and that it did not affect the appellants.

In April, 1929, the plaintiff renewed his application to the District Judge for execution of the decree of the 11th November, 1925; the appellants filed objections to the application.

The District Judge, on the 26th August, 1929, held that the Judicial Commissioner in his decree used the words "a decree for the specific performance of the agreement against Mohammad Afzal" in a comprehensive sense and that the phrase included more than the execution of the sale deed. He therefore decided that the decree could be executed not only against Mohammad Afzal but also against the appellants.

Against this decision of the District Judge, the appellants in October, 1929, appealed to the Judicial Commissioner, and in December, 1929, the plaintiff applied to the Judicial Commissioner for amendment of his decree of the 11th November, 1925.

The Judicial Commissioner heard the appeal and the application, and on the 18th January, 1930, he delivered one judgment which covered both matters. He granted the plaintiff's application for amendment, holding that he had jurisdiction to make the amendment under section 152 of the Civil Procedure Code. After the amendments the decree was for "specific performance of the agreement, dated 1st May, 1921, and for possession of the suit land against all defendants."

The Judicial Commissioner held that, in view of his decision that the decree should be amended as above-mentioned, it was not necessary for him to decide whether the District Judge in his order of the 26th August, 1929, rightly interpreted his decree of the 11th November, 1925, and he formally upheld the District Judge's order.

On the 28th January, 1930, the District Judge directed that the execution of the decree should proceed, and on the 9th November, 1930, the plaintiff obtained possession of the lands in suit. The appellants applied to the Judicial Commissioner for leave to appeal to His Majesty in Council but the application was refused on the 26th June, 1930. In his order the Judicial Commissioner held that the appellants were bound to account for the mesne profits. Thereupon the appellants applied to His Majesty in Council for special leave to appeal, and on the 21st November, 1930, leave was granted. It is necessary to set out the exact terms of the order.

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The material part is as follows:—

"(1) Leave ought to be granted to the petitioners to enter and prosecute their appeal against the Order of the Judicial Commissioner of the North-West Province, dated the 18th day of January, 1930, amending the decree, dated the 11th day of November, 1925, as well as from the decree as amended and the subsequent Order, dated the 26th day of June, 1930, in execution granting mesne profits to the respondent; (2) that a stay of execution ought to be granted on terms that the petitioners do give security to the satisfaction of the Court of the said Judicial Commissioner for mesne profits until the final determination of the matter and upon depositing in the Registry of the Privy Council the sum of £400 as security for costs."

In the first place it was argued on behalf of the appellants that the Judicial Commissioner had no jurisdiction to make the order of the 18th January, 1930, amending the decree of the 11th November, 1925, inasmuch as there was no accidental slip or omission within the meaning of S. 152 of the Civil Procedure Code of 1908 under which the Judicial Commissioner purported to act. The section is as follows:—

"Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

The Judicial Commissioner stated in his judgment that there had been a misconception by him of the nature of the plaint, but that his intention was to grant the plaintiff the relief which he claimed. It was argued that the only relief which the plaintiff claimed in his plaint was against the defendant Mohammad Afzal, and consequently that there was no accidental slip or omission and that the Judicial Commissioner had no jurisdiction to amend the decree by giving the plaintiff relief against the appellants which had not been claimed in the plaint. It was further urged on behalf of the appellants that they had abandoned their appeal to the King in Council against the decree of the 11th November, 1925, relying on the fact that the decree as drawn did not make them liable for anything except costs, and consequently that the Judicial Commissioner ought not to have made the order amending the decree even if he had jurisdiction under S. 152 of the Civil Procedure Code.

During the course of the argument their Lordships' attention was drawn to the terms of the Order of His Majesty in Council by which leave to appeal was granted, and to which reference has already been made. It then appeared that the appellants had obtained leave to appeal not only from the order of the 18th January, 1930, amending the decree of the 11th November, 1925, but also from the decree as amended. It was

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therefore open to the appellants to argue on the merits that the decree of the 11th November, 1925, as amended was wrong, and the hearing of the appeal was adjourned to allow learned counsel to argue the appeal on that basis.

After the adjournment the appeal was argued upon the merits of the case, and their Lordships propose to deal with the appeal in the first instance from this point of view.

It appears that Mohammad Afzal Khan was a member of a well-known family of Mardan in the Peshawar District. He succeeded to a flourishing estate in the year 1915 and from that time onwards he seems to have been steadily dissipating it. From August to December, 1920, on the strength of several mortgages he borrowed Rs. 80,000 from the firm of Attar Singh of Hoti. This led his relatives to apply to the District authorities that he should be taken under the superintendence of the Court of Wards. The application was made on 16th December, 1920. In January and February, 1921, Mohammad Afzal Khan appears to have borrowed a further sum of Rs. 60,000 from the firm of Partap Singh of Hoti. Apparently by this time his credit with the Mardan money-lenders was exhausted, for at the beginning of May, 1921, he approached K. S. Mian Feroze Shah, a Mian of Ziarat of Kaka Sahib, who lives at Nowshera. On 1st May, 1921, he entered into an agreement with Feroze Shah undertaking to sell him his land in Ahmedabad and Narai at the rate of Rs. 170 a *jarib*. He received Rs. 12,000 in cash on the spot. On subsequent dates from the 27th May to 27th August he received further sums of Rs. 41,900. Under the terms of the agreement a deed of sale was to be executed and registered within a week, a time which was subsequently extended to a month. Mohammad Afzal himself raised very strong objections to being taken under the Court of Wards. Finally, the application, which had been strongly recommended by the Assistant Commissioner of Mardan, was rejected by the Chief Commissioner, North-West Frontier Province, on 5th December, 1921. From that date onwards Mohammad Afzal, who had hitherto been in alliance with Feroze Shah, began to side with his relatives. On 2nd March, 1922, he sold his house and *Hujra* to Mohammad Aslam Khan, his first cousin. On 3rd April, 1922, he sold the land in Ahmedabad (which was covered by the above-mentioned agreement) to Mohammad Aslam Khan and his (Mohammad

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Afzal's) step-mother and step-sister who are the appellants in this appeal.

Part of the consideration of the sale of 3rd April, 1922, was land belonging to the appellants in the village of Kot Jhungra. On the 7th December, 1922, Mohammad Afzal sold part of this Kot Jhungra land to another first cousin Dost Mohammad Khan, and some time later he sold the remainder of the same land to the same cousin.

On the issues raised in the case the Judicial Commissioner held (1) that Mohammad Afzal was not insane or under the influence of the plaintiff, but that he was reckless and grossly extravagant; (2) that the sum of Rs. 53,900 had been paid by the plaintiff to the defendant Mohammad Afzal; (3) that the agreement of 1st May, 1921, amounted to a legal contract capable of enforcement as such; (4) that the parties did intend to act upon the agreement.

None of the above-mentioned decisions of the Judicial Commissioner have been disputed in this appeal, and it therefore falls to be decided upon the assumption that the above-mentioned findings are correct.

The important question arises upon the next issue considered by the Judicial Commissioner, viz., whether the appellants were protected by the exception contained in clause (*b*) of S. 27 of the Specific Relief Act, 1877. The section is as follows:—

"Except as otherwise provided by this Chapter specific performance of a contract may be enforced against (*a*) either party thereto; (*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

Their Lordships have no doubt on the facts of this case that specific performance of the contract of the 1st May, 1921, could have been enforced by the plaintiff against the defendant Mohammad Afzal but for the fact that he had transferred the lands, covered by the sale of the 3rd April, 1922, to the appellants; further, that the appellants are persons claiming under the said defendant by a title arising subsequently to the said contract between the plaintiff and Mohammad Afzal. The question therefore arises whether the appellants were transferees for value who had paid their money in good faith and without notice of the original contract.

It was alleged that the appellants had paid Rs. 10,000 to Mohammad Afzal before the execution of the sale deed of the

3rd April, 1922. The balance of that part of the consideration, which was to be paid in money, viz., Rs. 17,950, admittedly had not been paid.

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The Judicial Commissioner was of opinion that the passing of the consideration of Rs. 10,000 was "a matter of some doubt"; he did not, however, decide that it was not paid. His finding was that the appellants had notice of the agreement of the 1st May, 1921, between Mohammad Afzal and the plaintiffs, and that it was difficult to ascribe to them the character of *bona fide* purchasers. He therefore held that the appellants were not protected by clause (*b*) of S. 27 of the Specific Relief Act.

Their Lordships, after examination of the evidence, are not prepared to hold that the sum of Rs. 10,000 was not paid by the appellants to Mohammad Afzal, though they are not surprised at the doubt which was expressed by the Judicial Commissioner with respect to that matter.

There remains the question whether the appellants had actual or constructive notice of the agreement of the 1st May, 1921, at the time when the deed of sale of the 3rd April, 1922, was executed.

A question was raised as to the party upon whom the onus in respect of this matter rested. Their Lordships do not consider it necessary to enter upon a discussion of the question of onus because the whole of the evidence in the case is before them and they have no difficulty in arriving at a conclusion in respect thereof.

The Judicial Commissioner held that the appellants must have known on the 3rd April, 1922, of the agreement which Mohammad Afzal had made with the plaintiff on the 1st May, 1921. Their Lordships are not prepared to hold that the Judicial Commissioner's finding in this respect was wrong. There was evidence upon which he might arrive at that conclusion.

However that may be, their Lordships upon consideration of the whole evidence, both verbal and documentary, are clearly of opinion that the circumstances connected with Mohammad Afzal's dealings with his property, which were undoubtedly known to the appellants, were such as to put the appellants upon enquiry, and that if reasonable enquiries had been made by the appellants before the transaction of the 3rd April, 1922, they must have become aware of the agreement between the plaintiff and Mohammad Afzal of the 1st May, 1921.

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The appellants therefore cannot predicate of themselves that they are transferees without notice of the original contract within the meaning of the exception in S. 27 (*b*) of the Specific Relief Act of 1877.

As already mentioned the whole matter is before their Lordships on this appeal, and it is open to them to make the proper order in view of the above-mentioned conclusions. They are of opinion that the plaintiff should have a decree for specific performance of the agreement of 1st May, 1921, against the appellants as well as against Mohammad Afzal, subject to the appellants' right of pre-emption, which will be referred to hereinafter.

In view of the above-mentioned conclusions it is not necessary for their Lordships to express, and they do not express, any opinion upon the question whether the Judicial Commissioner on the facts of this case had jurisdiction under the provisions of S. 152 of the Civil Procedure Code, on the 18th January, 1930, to amend his decree of the 11th November, 1925.

It was agreed by the learned counsel that the appellants had a right of pre-emption in the lands comprised in the agreement of the 1st May, 1921. The terms upon which the decree for specific performance should be made are in the discretion of their Lordships, and they direct that the decree for specific performance already mentioned, shall not be enforced if the appellants exercise their right of pre-emption and pay to the plaintiff the sum of Rs. 49,380 within six months from the date of His Majesty's Order in Council. The above-mentioned sum is the amount alleged by the plaintiff in his plaint to be the price of the lands according to the rate fixed in the agreement. If and when the said sum is paid to the plaintiff by the appellants, the plaintiff must give up possession of the above-mentioned lands to the appellants.

There remains the question of the mesne profits. There is no claim for mesne profits in the plaint, but their Lordships are of opinion that the plaintiff should have leave to amend his plaint by claiming mesne profits and upon such amendment being made a decree for mesne profits should be passed. The period in respect of which mesne profits should be allowed remains to be considered. The amendment of the Judicial Commissioner's decree was not made until the 18th January, 1930, and the plaintiff obtained possession by way of execution on the 9th November, 1930. The facts of this case are so

peculiar and out of the ordinary that their Lordships are of opinion that the decree for mesne profits, if made after amendment of the plaint, should be confined to the mesne profits accruing during the period from the 18th January, 1930, to the 9th November, 1930. The amount of such mesne profits will necessitate an enquiry in India, unless the amount can be agreed upon by the parties.

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In the result their Lordships are of opinion that the decree of the District Judge, dated the 28th June, 1924, the decree of the Judicial Commissioner, dated the 11th November, 1925, the decree of the Judicial Commissioner, dated the 18th January, 1930, and the decree of the Judicial Commissioner of the 26th June, 1930, be set aside except in so far as the decrees contain directions as to costs, which directions shall stand. Further, they are of opinion that a decree should be made in favour of the plaintiff-respondent against Mohammad Afzal and the appellants for specific performance of the agreement of the 1st May, 1921, and, if the plaint be amended, for mesne profits upon the terms and conditions hereinbefore mentioned.

Any directions, which may be necessary for carrying out the terms of the Order in Council, should be made by the Judicial Commissioner who will have discretion as to the costs relating to such directions.

Their Lordships will humbly advise His Majesty accordingly. The appellants must pay to the plaintiff-respondent his costs of this appeal.

Solicitors for appellants: *Ranken, Ford and Chester.*

Solicitors for respondent: *T. L. Wilson & Co.*

K. J. R./S. R. *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Ramanuja Krishna Aiyangar and another .. *Appellants** *(Defendants)*

v.

Ramanuja Alwarappa Aiyangar .. *Respondent* *(Plaintiff).*

Civil Procedure Code (V of 1908), S. 92—Sanction—Need for—Test of—Suit by co-trustee for declaration of his rights and settlement of a scheme for the management of the trust by rotation.

Krishna Aiyangar *v.* Alwarappa Aiyangar.

* S. A. No. 720 of 1930. 23rd August, 1932.

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The test of the applicability of S. 92 is to be found in the reliefs prayed for, and not in the nature of the suit. If the case relates to a breach of trust of the nature specified in sub-sec. (1) or the direction of the Court is deemed necessary for the administration of any such trust and the relief prayed for is one of those specified therein, sanction is necessary for the suit even though the suit is not of a representative nature. A suit brought by a trustee against his co-trustees for a declaration of his individual rights and for the settlement of a scheme for the management of the trust by rotation is, so far as the latter relief is concerned, not maintainable without the previous sanction required by the section.

Abdur Rahim v. *Mahomed Barkat Ali*, (1927) L. R. 55 I. A. 96: I. L. R. 55 Cal. 519: 54 M. L. J. 609 (P C.), relied on.

Where, however, such a relief is based upon an agreement between the trustees or the terms of a will executed by the founder, the suit would be merely to enforce the terms of the contract or the will and no sanction under the section necessary for the suit.

Durai v. *Duraiswami Pillai*, A. I. R. 1927 Mad. 948, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 118 of 1928 preferred against the decree of the Court of the District Munsif of Srivaikuntam in O. S. No. 88 of 1927.

B. Sitarama Rao and *K. Venkateswaran* for appellants.

K. Desikachari for respondent.

The Court delivered the following

JUDGMENT.—The only point for consideration in this second appeal is, whether the plaintiff's suit, so far as it asks for the settlement of a scheme for the management of the Trust properties in rotation by the plaintiff and defendants 1 and 2, is maintainable in this form, or in other words, whether S. 92 of the Civil Procedure Code is a bar to the maintainability of this suit so far as the above-mentioned prayer is concerned. The trial Court was of opinion that such relief could be granted only in a suit under S. 92, Civil Procedure Code, whereas the lower appellate Court came to a different conclusion and held that that relief could be granted to the plaintiff even in this form of action. The question is not altogether free from difficulty. There is, no doubt, that the trust mentioned in the plaint was created for public purposes of a charitable nature. The plaintiff's status as a co-trustee along with defendants 1 and 2 and his right to be in joint possession of the trust properties have been declared. The further relief asked for in the plaint is the subject-matter of dispute in the present second appeal. The observation in the order of reference to a Full Bench in the case reported in *Appanna Poricha* v. *Narasinga Poricha*[1] is

1. (1921) I. L. R. 45 Mad. 113 at 116: 41 M. L. J. 608 (F.B.).

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to the effect, that even in a suit brought by a plaintiff for the establishment of his personal right as a trustee, if he asks the Court to settle a scheme for the management of the trust properties, he cannot obtain such relief except in a suit instituted under S. 92, Civil Procedure Code. But the observations of the judgments of two of the learned Judges who comprised the Full Bench indicate that the test is not merely the relief asked for being one of the reliefs mentioned in S. 92, but it must be also considered whether the suit is brought for the plaintiff in order to vindicate his own individual or personal right as against other persons interested in denying his rights or whether the suit is one brought by him on behalf of the public as a representative suit in the interests of the institution. It would appear that if the suit be one for the vindication of the right of management by a trustee and the dispute is between the trustees *inter se*, then the relief asked for in such a suit, though one specified in S. 92, could be granted, without the sanction of the Advocate-General or the Collector as required by the aforesaid section. But for the pronouncement by the Privy Council in the decision reported in *Abdur Rahim* v. *Mahomed Barkat Ali*[1] I should follow the view expressed in the aforesaid Full Bench decision. On a perusal of the observations of their Lordships of the Privy Council at page 529, it seems to me that they wanted to set at rest the conflict of judicial opinion by a clear pronouncement as to the real scope of S. 92, Civil Procedure Code. After stating that in some decisions it was held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by ordinary suits without being obliged to bring a suit of a representative nature, it is stated that great divergence of opinion had arisen in India in this connection not merely as between different High Courts but also different Benches of the same Court. Their Lordships construe sub-sec. (2) of S. 92, Civil Procedure Code, adopting the view taken by the Bombay High Court as opposed to the view taken by the other High Courts generally, and state that a suit which prayed for any of the reliefs mentioned in S. 92 could only be instituted in accordance with the provisions of that section. They further observe that the words used in sub-sec. (2) are appropriate and sufficient if that was the purpose. I take it, that this pronouncement has been made to set

1. (1928) L.R. 55 I.A. 96: I.L.R. 55 Cal. 519 at 529: 54 M.L.J. 609 (P. C.).

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at rest the controversy on this point, and as I understand the judgment of their Lordships it must be taken that the real test for applying S. 92 is to see whether the plaintiff has prayed for any of the reliefs mentioned in that section. In order to see whether sub-sec. (1) of S. 92 applies to any case, there seem to be two tests. One is whether the case relates to any breach of an express or constructive trust mentioned therein or whether the direction of the Court is deemed necessary for the administration of any such trust. The second test is whether the relief asked for is one of the reliefs specified in that section. If both these tests are satisfied we must hold that the suit is one covered by that section, which must be instituted after satisfying the requisites laid down in that section.

It is unnecessary to consider the argument by Mr. Sitarama Rao on behalf of the appellants that a relief of this kind, namely, settlement of a scheme for the management of a public charitable property, is one that was not within the competence of the mofussil Courts to grant, apart from S. 539 of the old Code or S. 92 of the present Code. It is unnecessary to canvass that point in the present case, in the view I have taken that the present suit, in so far as it asks for the settlement of a scheme for the management by way of invoking the directions of the Court for the administration of the trust, is covered by S. 92. If any relief of this kind is based upon an agreement arrived at between co-trustees or on the terms of a will executed by the founder of the trust or any other descendant of his when he was the sole trustee, the matter would be different. A suit brought on the basis of such an agreement or arrangement or the will would be merely to enforce the terms of the contract or the terms of the will. It cannot be considered to be a suit, where the directions of the Court for the administration of the trust are asked as being necessary for the proper management of the trust. In the present case, there is no such contract or arrangement; nor is there any evidence as to any usage regarding the mode of management of the trust property. I take it that the plaintiff by virtue of his being the holder of the office of trustee along with his co-trustees asks for directions of the Court regarding the administration of the trust by settling a scheme for its management by rotation. It seems to me that the decision in *Durai* v. *Duraiswami Pillai*[1], relied on by the lower appellate

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1. A. I. R. 1927 Mad. 948.

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Court, does not govern the present case, for the reasons already mentioned by me. In that case the direction for the management of the trust by rotation was based on the terms of the will and those directions were not given by the Court in the exercise of its discretion in the absence of any previous arrangement come to between the parties. If any scheme for the management of this trust is required, the proper course is to adopt the procedure prescribed in S. 92 of the Civil Procedure Code.

I therefore allow this appeal and set aside the decree of the lower appellate Court and restore the decree of the first Court. The order of the first Court passed as to costs will stand. In view of the partial success and failure of either party, I think fit to direct the parties to bear their respective costs here and in the lower appellate Court.

S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Thiagaraja Mudaliar, minor, by next friend Janaki Ammal and another .. *Appellants* (Defendants No. 3 and 2)*

v.

Vedathanni .. *Respondent (Plff.).*

Thiagaraja Mudaliar v. Vedathanni.

Evidence Act (I of 1872), S. 92—Written instrument—Plea of sham transaction—Evidence to prove—Admissibility.

Although evidence to vary or modify the terms of an agreement in writing is not admissible, oral evidence is admissible to prove that an agreement in writing was in fact no agreement at all but was only a sham or nominal transaction, not intended to be operative. It is therefore open to a widow to prove that an agreement purporting to provide for her maintenance was never intended to be given effect to or acted upon but was in fact brought about with the sole object of securing an acknowledgment from her of the undivided status of her husband by the insertion of a recital to that effect as a preamble to the deed of maintenance.

Ruthna Mudaliar v. *Arumugha Mudaliar*, (1872) 7 M. H. C. R. 189; *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba*, (1924) I.L.R. 3 Rang. 106. 48 M. L. J. 339 (P. C.); *Pertab Chunder Ghose* v. *Mohendra Purkait*,

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*Appeal No. 162 of 1929. 17th March, 1932.

Thiagaraja Mudaliar *v.* Vedathanni.

(1889) L. R. 16 I. A. 233: I. L. R. 17 Cal. 291 (P. C.); *Navalbai* v. *Sivubai*, (1906) 8 Bom. L. R. 761 and *Ramdhani* v. *Kowal Mani*, A. I. R. 1926 Pat. 156, relied on.

Lachman Das v. *Ram Prasad*, (1927) I. L. R. 49 All. 680, dissented from.

Sangira Mallappa v. *Ramappa*, (1909) I. L. R. 34 Bom. 59; *Mottayappan* v. *Palani Goundan*, (1913) I. L. R. 38 Mad. 226: 25 M. L. J. 290; *Dasari Lakshmiayya* v. *Coppolu Murachari*, (1929) 31 L. W. 516 and *Afar* v. *Surja Kumar Ghose*, (1908) 15 C. W. N. 249, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Negapatam in O. S. No. 22 of 1928.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *A. V. Viswanatha Sastri* for appellants.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for respondent.

The Court delivered the following

Sundaram Chetty, J.

JUDGMENTS. *Sundaram Chetty, J.*—This appeal arises out of a suit filed by the plaintiff-respondent to recover a sum of Rs. 1,15,000 from out of the estate in the hands of defendants, on account of the arrears of maintenance due to her for a period of nearly 11½ years at the rate of Rs. 10,000 per annum. The plaintiff's case is, that her deceased husband Ramalinga Mudaliar and his elder brother, the late Somasundara Mudaliar, were brothers who were the last surviving male coparceners of a very rich family known as the Vadapathimangalam family, that the plaintiff's husband died issueless on 23rd December, 1912, at Tiruvarur, and that soon after the annual ceremony of her deceased husband, she left the family house in which Somasundara Mudaliar was living and went over to her parent's house about the beginning of the year 1914 and from that time onwards she was living separately from the family of her husband's brother. The plaintiff's husband and his elder brother owned properties (moveable and immoveable) of the approximate value of 50 lakhs. The extent of their wet and dry lands was about 1,500 *velis* (about 10,000 acres). The annual income of the family properties would be about 2½ lakhs according to the estimate given in the plaint. For more than 12 years before his death, the plaintiff's husband was living separately from his brother in one of the family houses situated at Vijiapuram near Tiruvarur and was also in separate enjoyment of a portion of the family properties. Immediately after the death of the plaintiff's husband, Somasundara apprehended trouble on account of a possible claim being put forward by the

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plaintiff at the instigation of her relations for a moiety of the family properties, alleging a division in status between her husband and his brother. Feeling nervous at the idea of a possible litigation which would be fraught with disastrous consequences, Somasundara was anxious to secure some sort of admission from the plaintiff as to the undivided status of the family and with this object in view he got executed a document on 28th December, 1912, containing a recital as to the undivided status of the family and in that document he also purported to make certain arrangements for the maintenance of the plaintiff, but it was, however, distinctly understood between the parties that the provisions for the maintenance contained in the deed should not be given effect to or acted upon by them. This document was solely intended as a voucher for the recognition of the joint status of the family by the plaintiff and the real and final arrangement for the plaintiff's maintenance was agreed to be left over for future settlement at leisure on a scale commensurate with the position and status of the family. It is further alleged in the plaint, that the immoveable properties set forth in that deed as having been allotted for the plaintiff's maintenance were never enjoyed by her but continued to remain in the possession and enjoyment of Somasundara himself as part of his family properties down to his death which occurred on 17th January, 1925. During the lifetime of Somasundara, the plaintiff was making demands for adequate provision being made to her for her maintenance and he was promising to make suitable provision in conformity with the status of the family. Somasundara died issueless leaving behind him his two widows who are the 1st and 2nd defendants. In pursuance of an alleged authority given to the 2nd defendant by the late Somasundara, she adopted the 3rd defendant as her son on 1st July, 1925, having entered into an ante-adoption agreement with the natural father of the minor on 21st June, 1925. That agreement provides agreeably to the intentions of the deceased Somasundara that the plaintiff was to be given for her maintenance Rs. 6,000 and 500 kalāms of paddy per year besides being permitted to enjoy for her lifetime the lands mentioned in the deed dated 28th December, 1912. Those lands would yield an income of about Rs. 2,500 per year. In the interests of the peace of this respectable family the plaintiff is inclined to accept Rs. 10,000 per annum on account of the arrears of maintenance due to her.

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The 1st defendant, senior wife of Somasundara, was disputing the validity of the adoption of the 3rd defendant and had also instituted O. S. No. 22 of 1925 on the file of the Tiruvarur Sub-Court for a declaration of the invalidity of the adoption. The 2nd defendant for herself and as guardian of the minor 3rd defendant states that she had no knowledge of the circumstance under which and the purpose for which the registered maintenance deed, dated 28th December, 1912, came into existence, and she accordingly puts the plaintiff to proof of the allegations made by her in respect of it. It is admitted that the plaintiff did not receive the income of the lands set apart for her maintenance under the said deed and therefore she should only be entitled to the profits of those lands in respect of her past maintenance after ascertainment of those profits by the Court.

The learned Subordinate Judge found the case set up in the plaint to be substantially true and held that the maintenance deed in question (Ex. I) was never intended to be acted upon and was also never acted upon. In the view that that document purporting to be a maintenance deed was only a sham, he treated it to be inoperative and held that it would not debar the plaintiff from claiming a reasonable rate of maintenance for the plaint-mentioned period on account of arrears due to her. Considering all the circumstances of this case, he allowed the plaintiff's claim for arrears of maintenance at the rate of Rs. 6,000 per annum and passed a decree accordingly. As against this decision, defendants 2 and 3 have filed this appeal, while the plaintiff has filed a memorandum of objections stating that the full rate claimed by her in the plaint should have been allowed by the Lower Court.

When the present claim of the plaintiff is resisted on the strength of the registered deed, Ex. I, to which she and her husband's brother Somasundara were parties, there is no doubt that the burden of proving that this deed which is ostensibly a deed of maintenance was only a sham is upon the plaintiff. As observed in the decision in *Ranga Aiyar* v. *Srinivasa Aiyangar*[1] there must be clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. In order to substantiate such a case it should be shown for what purpose other than the ostensible one

1. (1897) I. L. R. 21 Mad. 56.

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the deed was executed. It is necessary to understand under what circumstances Ex. I came to be executed. [His Lordship then discussed the evidence and continued:]

In the view I have taken of the facts disclosed in this case, I consider that the deed in question, which sounds ostensibly like a deed of maintenance, was executed nominally, or in other words, not with the intention of giving effect to that deed as an operative contract, grant or disposition, but it was brought about in this form by Somasundara with the sole object of securing a sort of acknowledgment by the plaintiff of the undivided status of her husband. This object has been achieved by the insertion of a recital to that effect as a preamble to the maintenance deed, Ex. I, but that is only a statement of a fact and not part of any contract, grant or disposition. Ex. I, if treated as a contract, grant or disposition is shown to be wholly nominal or sham and as such it is void and unenforceable. It does not represent any real agreement arrived at as between the plaintiff and Somasundara. This is not a case where oral evidence is sought to be adduced for showing that Ex. I is enforceable not according to its plain terms, but in a modified form by something being substituted for or subtracted from or added to any of the terms expressly mentioned therein. It is only when parol evidence is sought to be let in for proving such a case, that S. 92 of the Indian Evidence Act would be a bar and render such oral evidence inadmissible. What the plaintiff seeks to prove in this case is that there was never any real disposition at all under Ex. I.

Evidence to prove such a plea does not come within the scope of S. 92.

The observations in *Harris* v. *Rickett*[1], which was followed in *G. Ruthna Mudaliar* v. *K. Arumugha Mudaliar*[2], seem to be pertinent to the present case. Bramwell, J., says:

"The principle of the rule is, that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The difficulty is, that in this case there was evidence that the parties did not agree that the written agreement should be the evidence of the contract"

In *G. Ruthna Mudaliar* v. *K. Arumugha Mudaliar*[2] the principles laid down in the case of *Pym* v. *Campbell*[3] were followed, and Morgan, C. J., observes at page 196 as follows:

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1. (1859) 28 L. J. Exch. 197. 2. (1872) 7 M. H. C. R. 189.
3. (1856) 6 E. & B. 370.

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"But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its terms can be made by parol. With respect to this, I take the law to be that, notwithstanding a paper writing, which purports to be a contract, may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it."

It is true that this decision was given before the passing of the Indian Evidence Act. But this same principle has been adopted in later decisions given after S. 92 of the Evidence Act had come into operation. In the case reported in *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba*[1] their Lordships of the Privy Council have explained the scope of S. 92 of the Indian Evidence Act in the following passage occurring at page 125:

"The preamble to the Evidence Act recites that 'it is expedient to consolidate, define and amend the Law of Evidence', and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances."

This observation shows that in respect of S. 92 of the Evidence Act, oral evidence is admissible to prove that an agreement in writing was really no agreement at all but was only a sham as it was not intended to be operative. The dictum in Woodroffe and Ameer Ali's commentary on the Indian Evidence Act, namely, "although evidence to vary the terms of an agreement in writing is not admissible, yet the evidence that there is not an agreement at all is admissible" has been disapproved by Ashworth, J., in the decision reported in *Lachman Das* v. *Ram Prasad*[2] as not being the correct law. The learned Judge says at page 685 that evidence in any shape cannot be admitted for the purpose of showing that there was no agreement at all or, in other words, that a deed was meant to be inoperative. If this be the correct view, I am afraid that several cases which have arisen in India, wherein deeds of various kinds have been held to be nominal or sham transactions or intended to be inoperative on the strength of proof adduced in the shape of oral evidence and surrounding circumstances, should be deemed to have been not rightly decided. With great respect, I have to dissent from the view expressed by the learned Judge in the aforesaid case.

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1. (1924) I. L. R. 3 Rang. 106: 48 M. L. J. 339 (P.C.).
2. (1927) I. L. R. 49 All. 680.

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In the case reported in *Pertab Chunder Ghose* v. *Mohendra Purkait*[1] the Privy Council have held that a tenant, who had executed a kabuliyat containing a stipulation which the landlord had told him would not be enforced, could not be held to have assented to it and the kabuliyat was not the real agreement between the parties and the plaintiff could not sue upon it. This principle was followed by the Bombay High Court in the case reported in *Navalbai* v. *Sivubai*[2]. Sir Lawrence Jenkins, C. J, after referring to a relevant passage in the aforesaid Privy Council decision, observes at page 763 as follows:—

"So in this case if the plaintiffs were told that the document which in form is a sale-deed, would not be enforced as such against them and on the faith of that representation Hariba executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale-deed."

In the case reported in *Ramdhani* v. *Kowal Mani*[3] it is observed that the authorities establish that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. The decisions in *Pym* v. *Campbell*[4], *Ruthna Mudaliar* v. *Arumugha Mudaliar*[5] and *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba*[6] have been cited and considered as authorities for the aforesaid principle. These decisions are in my opinion applicable to the facts and circumstances of the present case. There is an indication in the decision reported in *Appa Dhond* v. *Babaji Krishnaji*[7] that proof is permissible even where a deed is attacked as partly genuine and partly not genuine. Sir Macleod, C.J., has expressed his view on this point at page 87 as follows:—

"But though the Courts have in the past recognised that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion."

In view of all the aforesaid authorities, it should be held that the oral evidence let in by the plaintiff in this case is admissible and cannot be deemed to be obnoxious to the provisions of S. 92 of the Indian Evidence Act.

As I have already observed, this is not a case where oral evidence is sought to be adduced for proving that the deed is

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1. (1889) L. R. 16 I. A. 233: I. L. R. 17 Cal. 291 (P.C.).
2. (1906) 8 Bom. L. R. 761.
3. A. I. R. 1926 Pat. 156.
4. (1856) 6 E. & B. 370.
5. (1872) 7 M. H. C. R. 189.
6. (1924) I. L. R. 3 Rang. 106: 48 M. L. J. 339 (P. C.).
7. (1921) I. L. R. 46 Bom. 85.

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operative not in the manner set forth therein, but in a different manner as settled by a contemporaneous oral agreement. Such a case would be one of substituting a new and different contract for the one expressed in writing. The plaintiff in the present case does not say that Ex. I should be held to be operative not as it purports to be but in a different manner or as a different kind of contract or grant. Such a plea would not be open to her and no evidence can be adduced to substantiate that plea. This is the principle of the decisions in *Sangira Mallappa* v. *Ramappa*[1] and *Mottayappan* v. *Palani Goundan*[2]. This is the view which my learned brother Curgenven, J., has expressed in the decision in *Dasari Lakshmiayya* v. *Coppolu Murachari*[3]. Similarly in *Afar* v. *Surja Kumar Ghose*[4] evidence to prove that the real intention of the parties was something at variance with one of the terms of the contract and that that term should be enforced in the manner intended but not in the manner expressed, was held to be inadmissible. These cases have really no application to the present case, in view of the findings of fact set forth above.

I uphold the finding of the Lower Court, that the deed Ex. I was never intended to be acted upon as a maintenance deed. If it was not meant to be really operative as between the parties and to be acted upon, then it is virtually a sham and would not be an effective bar to the present claim of the plaintiff.

It follows, therefore, that the plaintiff is not bound to claim only the profits of Andiyur village provided for her in Ex. I on account of the arrears of maintenance now claimed by her. It is left to the discretion of the Court to fix a proper and adequate rate of maintenance, having due regard to all the circumstances of the case. The learned Subordinate Judge has dealt with this question in the light of the authorities bearing on this point and has paid due attention to the special circumstances disclosed in this case. There is nothing to show any waiver or abandonment by the plaintiff of her claim for the arrears of maintenance. The evidence shows that she was making demands on Somasundara for the decent provision for her maintenance from time to time but that Somasundara was somehow postponing the same holding out promises only. The learned Subordinate Judge has referred to some of the circum-

1. (1909) I. L. R. 34 B. 59.
2. (1913) I. L. R. 38 Mad. 226: 25 M. L. J. 290.
3. (1929) 31 L. W. 516.
4. (1908) 15 C. W. N. 249.

stances in paragraphs 80 to 82 of his judgment. His observations are as follows:—

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"The plaintiff was born and bred up in a rich family. She was married to a member of a much richer family. She lived with her husband in very high style for nearly 14 years. After a year of her husband's death she went to live separately and she was looked after by her affluent brothers. She was with them till 1922 when they separated. From 1922 she is living separately in one of the houses set apart to a brother. Her brothers met all her wants. The plaintiff's own means are little. She had ornaments worth about Rs. 14,000 or 17,000. Some of them she sold and converted into cash. . . . .

She performed pilgrimages to Benares, Rameswaram and other places all of her own accord and with her own money or with the help of her brothers and even then nothing was given to her by Somasundara Mudaliar."

I am in entire agreement with these observations. There is no evidence to show that the plaintiff incurred any debts for the purposes of meeting the expenses of her maintenance, etc. After a careful consideration of all the facts and circumstances, the learned Subordinate Judge has fixed a lower rate of maintenance than what is claimed in the plaint on account of the arrears and allowed at the rate of Rs. 6,000 a year, *i.e.*, Rs. 500 per mensem. Considering the vast magnitude of the estate, the rate allowed by him cannot cause any hardship to the adopted son (3rd defendant) ; nor can it be considered to be unduly high or excessive. I consider that the rate allowed is moderate and perfectly reasonable. In this view, no higher rate can be allowed to the plaintiff as claimed by her in the memorandum of objections.

In the result, I would dismiss both the appeal and the memorandum of objections with costs.

Curgenven, J.

Curgenven, J.—I confess to having felt some hesitation in deciding whether the view of this case taken by the Lower Court and by my learned brother is justified by the evidence; that is to say, whether the plaintiff's claim to arrears of maintenance can be allowed in spite of the provisions of the maintenance deed, Ex. I.

I fully agree that it is clear from all the surrounding facts, —the removal of the plaintiff's husband, Ramalinga Mudaliar, to his brother Somasundara's house in spite of the opposition of his wife and others, the extreme and almost indecent haste with which the maintenance deed was put through, although there is no reason to suppose that any claim of this character was made upon Somasundara or any wish expressed for such provision, the state of distress and seclusion in which the widow must have been at the time, the gross inadequacy of the provision made for her in the deed, the abstention of the plaintiff from availing

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herself of the maintenance so provided,—that this is not a case of voluntary acceptance after discussion of the terms of the provision made. It is quite evident that Somasundara was a masterful personality, that he intended to have things all his own way, and that he succeeded in imposing his will upon his brother's widow and such advisers as may have been available to her at the time. It is also pretty clear that he procured the execution of Ex. I with a view to avoid claims being made upon him at some later date when the plaintiff perhaps would be in a better position to assert them,—whether such claims might take the form of an allegation of divided status or of a demand for maintenance commensurate in amount to the whole value of the estate. There are sufficient indications to justify the conclusion that to no part of the document can the plaintiff have given her free consent except indeed to the concession to her of the jewels which are now claimed as her own. So far I have no hesitation in accepting the conclusions of the learned Subordinate Judge. My only doubt has been whether all these circumstances are not equally compatible with the theory, not that the document was intended by the parties to be inoperative but that the plaintiff was compelled to execute it by the exertion of undue influence on the part of Somasundara. It seems clear that if the plaintiff wants to establish her version of the circumstances she must exclude this possible alternative, because it would have required her to get the deed set aside before she could make an independent claim to arrears of maintenance, and since the period of three years allowed under Art. 91 of the Limitation Act has long since expired this form of relief would have been closed to her. It has in fact been suggested on behalf of the appellants that the plaintiff has been forced to make out that the deed was nominal in order to get over the difficulty created by limitation. It is necessary therefore to decide specifically that the document was really intended by the parties to it to be nominal and that the theory that the plaintiff was so influenced by her brother-in-law as to execute it as an acceptance of his terms is not a true explanation of the evidence. As to this, I think in the first place that quite a plausible reason has been given for inserting the maintenance provisions in the document. The brothers had been living apart, and so far as external indications went it looks as if quite a good case for separation in status having occurred might have been made. The allegation that Somasundara was

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uneasy upon this score is very probably true and is borne out by the express recital in the document that he and Ramalinga had been living as members of one and the same undivided family. He was therefore anxious to make the widow subscribe to a declaration of this character, without making it appear that this was the sole purpose of the document obtained from her. As to the extreme inadequacy of the provision made, my learned brother is a better judge of this than I am and I am prepared to accept his view that it reveals the sham character of the document rather than that the plaintiff's consent was extorted. The evidence relating to the house provided for the widow is then said to betray the real truth, because in the first place it was so situated that she could not with any self-respect live in it and in the second, Somasundara actually leased it for a period of three years after the maintenance deed had been executed. It is clear that he must at least have known that she would never want to occupy it. Lastly, there is the circumstance that Somasundara kept the document in his own possession, which is easily understood if he looked upon it merely as a declaration that he and his brother had been undivided in status. We have to read the oral evidence in the light of these considerations. It is true, as pointed out for the appellants, that not much of it can be said to come from an independent source. It is to be regretted I think that the plaintiff herself should have been examined on commission. Such a course, especially in a claim of this magnitude, ought very rarely to be allowed and I can see no good reason why this lady should not at least have given her evidence direct to the Court even if it had to be taken in chambers. As matters stand the trial Court was deprived of the opportunity of seeing the witness depose and of recording its impressions of her demeanour. The learned Subordinate Judge comments favourably upon the quality of the evidence she gave and as to this I can find no reason to differ from him. She appears to have told a consistent and straightforward story, which is borne out by the testimony of her two brothers, P. Ws. 3 and 6. The learned Subordinate Judge has refused to act upon the evidence of P. Ws. 2 and 4, but there seems no reason to discredit the attestor, P. W. 5, and the fact that his evidence is somewhat vague, natural enough after so long an interval, certainly does not incline me to believe it. On the main point, that the document

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was intended to show that the brothers were joint, he seems to be quite clear. One important witness, K. G. Srinivasa Mudaliar, who attested the deed, has been examined by neither party. It is difficult to surmise with whom his sympathies would have been. He is related to both sides and the plaintiff admits that she has deposited her savings with him. But the evidence of the Vakil, D.W. 8, goes to show that in another litigation he was fighting against the plaintiff's adviser, Gopalaswami Mudaliar. Reasons have been given for the inability to examine the other persons who took part in the execution of Ex. I. It would perhaps be unreasonable to expect better oral evidence of the circumstances in which the deed originated, and I agree that such evidence as has been produced is inconsistent with the general consideration to which I have alluded. On the whole I think that there are sufficient grounds for holding that the finding of fact reached by the learned trial Judge is correct.

On the question of application of S. 92 of the Evidence Act, it is to be observed that Ex. I comprises, or purports to comprise, three matters,—a declaration of status, a release by Somasundara of any rights he may possess in the jewels, etc., and a provision for maintenance. The declaration of status is a mere recital and is not in the form at any rate of a contract or of a term in a contract, and I do not think that for the purpose of applying S. 92 it has to be so regarded. As regards the jewels, etc., it is not denied that the plaintiff was allowed to retain these articles. It is argued that they were in fact her own property and that the provision was only inserted in order to lend an appearance of completeness to the document as a settlement of all her claims. It would have been better if the title of the plaintiff to those articles had been more explicitly examined at the trial but I think there can be little doubt that, possibly, with some trivial exceptions, they formed her own stridhanam property. It is significant that in the ante-adoption agreement subsequently entered into between the 2nd defendant and the 3rd defendant's natural father (Ex. C) there is a clause stating that

"As Janaki Ammal's (2nd defendant's) jewels, gold, vessels, etc., silver vessels, etc., and stridhana properties belong to her exclusively and as Somasundara Mudaliar Avergal's estate has no right whatsoever thereto, the adopted boy has no right or concern whatsoever therein,"

and this was probably how matters stood in the case of the plaintiff also. I agree therefore that this term of the

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document may be treated as nominal equally with the provision for maintenance. If so, I think it is clear that the case reduces itself to one of a wholly nominal contract, and the learned Advocate-General has confessed himself unable to contend that S. 92 can be applied to such a document; and as my learned brother has shown, there is no legal obstacle in the way of proving it to be a sham. Such proof having been adduced, the way lies open to the plaintiff to claim arrears of maintenance irrespective of the terms of the deed. I agree that the rate of maintenance fixed by the Lower Court should be accepted and that the appeal and the memorandum of objections should be dismissed with costs.

We certify for two sets of fees in the appeal.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Tadepalli Sriramulu and others ... *Appellants** (*Plaintiffs*)

v.

The Firm of Kothpara Sriramulu, Kothpara Venkata Ramachandrayya and Akula Satyanarayana represented by Kothpara Sriramulu, the Managing Partner and another .. *Respondents* (*Defts.*).

Sriramulu *v.* Firm of K. Sriramulu, etc.

Civil Procedure Code (*V of* 1908), *O.* 34, *R.* 5 (3)—*Application for final decree—Dismissal for non-payment of batta—Effect of—Further application for final decree—Maintainability.*

The dismissal of an application for a final decree in a mortgage suit for failure to pay batta cannot be construed as a dismissal of the suit itself; after a preliminary decree has been passed, the Court has no power to dismiss the suit. Nor does the dismissal of the application preclude another application for the same purpose, because by force of S. 141 of the Code, the applications are governed by O. 9 and on the dismissal of an application under R. 2 for non-service the plaintiff may put in a fresh application under R. 4 without seeking to have the previous order set aside.

Lachmi Narain Marwari v. *Balmakund Marwari*, (1924) L. R. 51 I. A. 321: I. L. R. 4 Pat. 61 : 47 M. L. J. 441 (P. C.), referred to

Venkatarama Chettiar v *Marudachala Goundan*, A. I. R. 1931 Mad. 795, approved.

Appeal against the decree of the District Court of Kistna, at Masulipatam, in A. S. No. 237 of 1928 preferred against

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* S. A. No. 1148 of 1928. 11th August, 1932.

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the decree of the Court of the District Munsif of Gudivada in O. S. No. 679 of 1926.

B. Somayya for appellants.

P. Venkataramana Rao and *P. V. Rajamannar* for respondents.

The judgment of the Court was delivered by

Jackson, J.

Jackson, J.—This is a class of case which has given Courts considerable trouble. The present 1st defendant obtained a preliminary decree upon a mortgage against the father of the present plaintiffs. There then followed these applications for a final decree.

Ex. A. Steps not taken. Dismissed.

Ex. B. Dismissed for failure to pay batta.

Ex. C. Dismissed.

Ex. D. 29th September, 1919, ordered on 14th November, 1919.

The plaintiffs have brought a suit to set aside the consequent sale on the plea that when the Court passed orders upon Ex. D, it had already dismissed the suit and was *functus officio*. The lower appellate Court has held that the Court's final decree was not made without jurisdiction and plaintiffs appeal.

In this case it is a pure assumption that the suit was dismissed, and there is no reason to suppose that the Court really intended anything of the sort. In *Lachmi Narain Marwari* v. *Balmakuud Marwari*[1], where the Judge actually used the phrase "The suit is dismissed for want of further prosecution" he explained that the object of dismissal "had not been to discharge or vacate the appellate decree". And as pointed out by the Judicial Committee in that case he would have no jurisdiction to dismiss the suit "the parties have on the making of the (preliminary) decree acquired rights which are fixed unless the decree is varied". All that the Munsif did in the present case was to dismiss the applications for a final decree because batta had not been paid. Before its amendment in 1st September, 1931, there was no provision in O. 34, R. 5 (3) for serving notice on parties; and a Court dismissing an application for a final decree on the ground of non-payment of batta for serving notice was acting under its inherent and not under any

1. (1924) L. R. 51 I. A. 321: I. L. R. 4 Pat. 61: 47 M. L. J. 441 (P. C).

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statutory power. It arrogates to itself the right to dismiss an application filed under O. 34, R. 5 (3). It is difficult to see how this peculiar action can be construed to be the dismissal of the suit itself, which, as pointed out by the Judicial Committee, is not within the power of the Court. A Court will not ordinarily be presumed to do an illegality. It seems better to follow the face of the record and to hold that the Court successively dismissed applications for a final decree. Such applications as observed by Curgenven, J., in *Venkatarama* v. *Marudachala*[1], are not applications in execution, and by force of S. 141, Civil Procedure Code, are governed by O. 9 and O. 17 as though they are suits. Under O. 9, R. 2 the Court dismisses the "suit," here, the application, for non-service. Then under O. 9, R. 4 the plaintiff may bring a fresh "suit," here, put in a fresh application. There is then no need for the plaintiff to get the previous order of dismissal set aside. *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah*[2], upon which the applicant strongly relies, lays down that the previous order is not *ultra vires*, though it may be erroneous. To this we entirely defer, and think it a dangerous doctrine that the judicial acts of Courts can be treated as mere nullities, and of no effect whatsoever. It was for this reason that this Court declined to interfere in revision in *Sreeramulu* v. *Nagabushanam*[3]. We also think it dangerous to carry the principle that a Court may rectify mistakes inadvertently made beyond the ambit of the facts in *Debi Bakhsh Singh* v. *Habib Shah*[4] and should hesitate to say, as in *Jodha Singh* v. *Gokaran Das Pande*[5] that a Court can revoke its own order of dismissal. But the line of reasoning in *Venkatarama* v. *Marudachala*[1] makes a revocation unnecessary. The orders of dismissal, Exs. A, B and C, stand as good orders, but plaintiff has in O. 9, R. 4 a *locus penetentiae* which gives room for a fresh application. It may be added that this is no artificial way of avoiding a hard case, but runs with the real facts of the situation. The Court when it dismissed the applications had no real intention of dismissing the suit and was only acting *in terrorem* as said in *Lachmi Narain Marwari* v. *Balmakund Marwari*[6] to induce plaintiff to pay process fees; and when

1. A. I. R. 1931 Mad 795.
2. (1921) 42 M. L. J. 51.
3. 1928 M. W. N. 542.
4. (1913) I. L. R. 35 All. 331.
5. (1925) I. L. R. 47 All. 546.
6. (1924) L. R. 51 I. A. 321: I. L. R 4 Pat. 61: 47 M. L. J. 441 (P. C.).

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plaintiff put in a fresh application it was precisely what the Court expected. Artificiality is imported by the assumption that the Court deliberately dismissed the whole suit and rendered itself *functus officio*.

Accordingly the appeal is dismissed with costs.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE PAKENHAM WALSH.

Venkata Reddi .. *Appellant** (*Petitioner—4th Defendant*)

v.

T. V. Dorasami Pillai .. *Respondent* (*Respondent—Plaintiff*).

Venkata Reddi v. Dorasami Pillai.

Civil Procedure Code (*V of* 1908), *O.* 21, *Rr.* 18 *and* 20—*Cross-decrees—Money decree and mortgage decree—Set-off in execution—Permissibility.*

The mere fact that one of two cross-decrees is a money decree and the other a mortgage decree does not by itself preclude the Court from allowing a set-off in execution if even under the mortgage decree the mortgagor is personally liable for the deficiency.

The Burma Oil Company, Ltd. v. *Ma Tin*, (1929) I. L. R. 7 Rang. 505 and *Sheo Shankar* v. *Chunni Lal*, (1916) I. L. R. 38 All. 669, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Vellore, dated 26th September, 1928, and made in E. A. No. 512 of 1928 in E. P. No. 86 of 1928 in O. S. No. 1 of 1926.

B. Somayya for appellant.

C. S. Venkatachariar for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—In this case the appellant before us is the 4th defendant in O. S. No. 1 of 1926. The plaintiff obtained a decree in that suit for Rs. 4,214-0-4 towards peishkush and road cess. In O. S. No. 25-A of 1918, which was a suit for redemption of a mortgage, the defendant obtained a final decree for Rs. 6,908-14-4. This final decree is a decree directing the sale of the mortgaged property and if there is any deficiency it should be paid by the plaintiff. In the connected appeal No. 35 of 1931 we have held that that final decree should not have been amended by the Subordinate Judge of

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*C. M. A. No. 353 of 1928. 5th August, 1932.

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Ramesam, J.

Chittoor and should remain as it was originally passed. The result is the mortgage decree is a decree for an amount which in the last resort may have to be paid personally by the plaintiff. In the petition against which this C. M. A. arises, E.A. No. 512 of 1928, the 4th defendant seeks to set off the money decree against him in O. S. No. 1 of 1926 against the mortgage decree obtained by him and to stop all further proceedings for his arrest in E. P. No. 86 of 1928 in execution of O. S. No. 1 of 1926. The question of law that arises before us is whether the two decrees can be so set off against each other. O. 21, R. 20 now enacts :

"The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge."

This shows that the mere fact that the decrees in which the set-off is sought are mortgage decrees or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed. I do not mean to say that there may not be some other objection. Without any other objection the mere fact that one of the decrees is a mortgage decree is not enough to refuse the set-off. This is the view of the Allahabad High Court in *Nagar Mal* v. *Ram Chand*[1] and this was always the view of the Madras High Court prior to the Civil Procedure Code of 1908. But the decision in *Nagar Mal* v. *Ram Chand*[1] had to be considered and was distinguished in *Sheo Shankar* v. *Chunni Lal*[2]. In that case the decree is a foreclosure decree which is of a nature giving simply an option to the mortgagor to redeem and if he does not, his right to redeem is simply foreclosed. It is not a decree to which ordinarily O. 21, R. 20 applies. Therefore that case is distinguishable. But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold and in such a case if he is not liable for the deficiency it cannot be said that there is any decree for money against him and it may be proper to describe the decree as one giving an option like the decree for foreclosure. In *Sheo Shankar* v. *Chunni Lal*[2] the person against whom the decree was sought to be set off was the purchaser of a portion only of the mortgaged property and he was under no personal liability. In such a case it may be said that he was filling a different character in

1. (1910) I. L. R. 33 All. 240. 2. (1916) I. L. R. 38 All. 669.

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the mortgage suit from the one in the decree sought to be set off. In the present case there is a personal decree against the plaintiff. By saying he is liable for all the deficiency that may remain after the sale, the true character of his liability is known. If the sale realises nothing, he is liable for the whole amount. In such a case to say that the sale must first be held and only for the balance the judgment-debtor in the mortgage decree is personally liable is to look at the matter too technically and to cause unnecessary expense to the parties. In such a case it may be very equitable and just to deduct the amount of the money decree from the mortgage decree and to permit execution for the balance only. The case in *The Burma Oil Company, Ltd.* v. *Ma Tin*[1] is also a case of a mortgage decree in which it is not clear that the mortgagor will be liable personally for the deficiency. In that case the decree at the time the question arose was only against the property and the decree provides for liberty to apply for a personal decree for the amount of the balance and one does not know how the application may end. On the actual facts I think that the decisions in *The Burma Oil Company, Ltd.* v. *Ma Tin*[1] and *Sheo Shankar* v. *Chunni Lal*[2] are correct; but they do not apply to the facts of the case before us. Therefore in this case there is no objection to the set-off claimed. The set-off is a satisfaction of the decree to that extent and if the balance after set-off is paid, the whole decree must be regarded as satisfied. We now direct the Subordinate Judge of Vellore to proceed with the execution of the mortgage decree after setting off the money decree towards it and to proceed with the execution for the balance. The appellant will be entitled to his costs in appeal. In the Court below each party will bear its own costs.

Walsh, J.

Walsh, J.—I agree.

[*N. B.*—The appellant gives an undertaking not to arrest the respondent in execution of the mortgage but will only proceed against his other property or set-off.]

S. R. *Appeal allowed.*

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1. (1929) I. L. R. 7 Rang. 505. 2. (1916) I. L. R. 38 All. 669.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Nagalingam Pillai .. *Petitioner**

v.

Sivachidambara Sabapathy Deekshitar .. *Respondent*.

Nagalingam Pillai *v.* Sivachidambara Sabapathy Deekshitar.

Limitation Act (IX of 1908), Art. 182 (5) (*as amended by Act IX of* 1927)—*Applicability*

If the right of the decree-holder to execute his decree had not become barred on the 1st January, 1928, when the Limitation (Amendment) Act IX of 1927 came into force, an application for execution made after that date is governed by the new provision of the amended Act.

Kanai Lall Sabui v. *Purna Chandra Chatterjee*, (1930) 34 C. W. N. 733 and *Sapani Patra* v. *Damodar Kar*, A.I.R. 1930 Pat. 207, followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Chidambaram, dated 15th August, 1928, and made in E. P. R. No. 1362 of 1928 in S. C. S. No. 682 of 1923.

S. Jagadisa Aiyar for petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The learned District Munsif of Chidambaram dismissed the execution petition filed by the assignee decree-holder in Small Cause Suit No. 682 of 1923 on the ground that the same was barred by limitation under Art. 182 of the Limitation Act. The assignee decree-holder has preferred this Revision Petition.

The facts are these. The decree in Small Cause Suit No. 682 of 1923 was passed on 20th June, 1923. On 9th January, 1925, an application for execution was filed, which however was dismissed on the 23rd March, 1925. On the 1st January, 1928, the Limitation (Amendment) Act IX of 1927—amending Art. 182 of the Limitation Act—came into force. On the 23rd March, 1928, the assignee decree-holder filed another application for execution which also was subsequently dismissed for default of prosecution. The present execution petition was filed on the 25th April, 1928, and it is with reference to that petition that the learned District Munsif observed that it was barred by limitation. Judged by the provisions of the old Art. 182—before it was amended in 1927—it is clear that the learned

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*C. R. P. No. 132 of 1929. 11th May, 1932.

Nagalingam Pillai *v.* Siva-chidambara Sabapathy Deekshitar.

District Munsif's decision was right. But as the amended Act came into force on the 1st January, 1928, we have to consider whether the right of the decree-holder to execute the decree had become barred by limitation on that date, *i. e.*, on the date on which the new Act came into force. If his right had not become barred and extinguished on that date, then any application for execution which he might make after that date would be governed by the provisions of the amended Act. Now, the decree having been passed on the 20th June, 1923, the application made on the 9th January, 1925, for execution was clearly within time. The decree-holder will have time till the 9th January, 1928, for filing a petition for executing his decree, and some eight days prior to that, *i. e.*, on the 1st January, 1928, the new Act came into force. It being therefore clear that when the new Act came into force, the right of the decree-holder to execute this decree was not barred by limitation, any subsequent application made by him to execute the decree would be governed by the provisions of the amended Act. The application made on the 23rd March, 1928, was therefore in my opinion in time, the same having been made within three years from the 23rd March, 1925, the date of order passed on the prior execution petition. Applying therefore the general principles that should govern a case when a new Limitation Act is passed, I think I must allow this Revision Petition.

I find that both the Calcutta High Court as well as the Patna High Court had to consider this very question. In *Kanai Lall Sabui* v. *Purna Chandra Chatterjee*[1] Mallik, J., of the Calcutta High Court had to consider substantially a similar point. The learned Judge observed that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there be a distinct provision to the contrary in the Act. On facts similar to the facts of the present case the learned Judge held that if execution of the decree be not barred when the new Act of 1927 came into force, any subsequent execution application would be in time if it should fulfil the conditions prescribed by the new Act. To the same effect is the decision by a Bench of the Patna High Court in the case reported in *Sapani Patra* v. *Damodar Kar*[2]. As observed in that case, an amending Act will not disturb vested rights. If at the time an amending Act

1. (1930) 34 C. W. N. 733. 2. A. I. R. 1930 Pat. 207.

came into force the decree-holder's right to execute the decree had not become barred by limitation, the learned Judges held that the subsequent application for execution would be in time if filed within three years from the date of the orders passed on the prior execution petition.

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For the above reasons, I am clear that the learned District Munsif was in error in his view regarding limitation in the present case. I reverse the order of the learned District Munsif and remand the execution petition for fresh disposal in accordance with law. The petitioner will be entitled to his costs of this Revision Petition.

S. R. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

S. A. S. Subbiah Aiyar .. *Appellant** (*Respondent*)

v.

The Official Receiver, Tinnevelly .. *Respondent* (*Petitioner*).

Subbiah Aiyar *v.* The Official Receiver, Tinnevelly.

Provincial Insolvency Act (*V of* 1920), *S.* 17—*Application by creditor—Debtor's death before adjudication—Order adjudicating estate of debtor insolvent—Whether proceedings could be conducted by Official Receiver in order to set aside alienation by the deceased debtor under Ss.* 53 *and* 54—*Effect of order.*

Where a debtor died before adjudication and the Court passed an order that the estate should thereby be adjudged as insolvent and an Official Receiver was appointed to administer it and in subsequent proceedings the Official Receiver applied to set aside certain alienations under Ss. 53 and 54 and the objection was taken that the application was incompetent as the transferor was not declared insolvent but only his estate,

Held, that the application by the Official Receiver was maintainable.

Venkatarama Aiyar v. *The Official Receiver, Tinnevelly*, (1927) I. L. R. 51 Mad. 344: 54 M. L. J. 585 and *Ramathai Ammi* v. *Kanniappa Mudaliar*, (1928) I. L. R. 51 Mad. 495: 55 M. L. J. 235, followed.

The Provincial Insolvency Act does not contain any provision similar to Ss. 108 and 109 of the Presidency Insolvency Act corresponding to S. 130 of the English Bankruptcy Act empowering the Insolvency Court to administer insolvent estates. Therefore considerations and decisions applicable to that power must not be confused with cases falling within S. 17 of the Provincial Insolvency Act which corresponds to S. 93 of the Presidency Towns Insolvency Act and S. 112 of the English Bankruptcy Act.

The words of S. 17 which are perfectly general cannot have a different effect merely because the debtor dies at an earlier stage—before adjudication.

Held, also, that the Judge who passed the order of adjudication intended to pass the right order but expressed himself as adjudging the estate because he thought that that was the proper way to word the order against a dead man.

Appeal against the order of the District Court of Tinnevelly, dated the 11th October, 1930, in C. M. A. No. 52 of 1930

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*A. A. O. No. 434 of 1930. 31st August, 1932.

Subbiah Aiyar v. The Official Receiver, Tinnevelly.

preferred against the order, dated 29th April, 1930, of the Court of the (Additional) Subordinate Judge of Tinnevelly in Original Petition No. 78 of 1929 in Insolvency Petition No. 58 of 1927 on the file of the Court of the Subordinate Judge of Tinnevelly.

T. R. Venkatarama Sastri and *P. R. Srinivasan* for appellant.

B. Sitarama Rao and *R. Krishnaswami* for respondent.

The Court delivered the following

JUDGMENT.—The two Lower Courts have arrived at opposite conclusions on the question whether when a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17 of the Provincial Insolvency Act the Official Receiver or creditors can invoke the power of the Court to set aside settlements and alienations voidable under Ss. 53 and 54. The first Court gave a negative answer and the lower appellate Court an affirmative answer to this question. I venture to think that the difficulty felt by the Lower Courts is due rather to the form of the order of adjudication which the Insolvency Court passed in the case rather than to anything obscure in the provisions or language of the Act.

The facts are simple and undisputed. A creditor's petition (I. P. No. 58 of 1927) was filed against one S. K. Krishna Aiyar. He died some 15 months afterwards before any order of adjudication was passed. Notice of the petition was sent to his minor son (2nd respondent) and on 4th February, 1929, the Court passed an order that the estate of the 1st respondent (Krishna Aiyar) be and the same hereby is adjudged as insolvent and that the Official Receiver, Tinnevelly, is appointed Receiver to administer it. The 2nd respondent (son of Krishna Aiyar) was ordered to produce the accounts and documents of title before the Official Receiver in one month and to perform all the other duties imposed by the said Act and also to apply for discharge of the estate within one year from the date of the order. In the course of the subsequent proceedings the Official Receiver applied to set aside certain alienations under Ss. 53 and 54. The appellant, the alienee, took ***inter alia*** the objection that the application was incompetent as his transferor had not been declared insolvent but only his estate. This objection was literally correct but only literally so. For it

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assumed firstly, that when proceedings are continued against the debtor after his death before the order for adjudication, the order passed under S. 17 must be not of the debtor himself but of his estate only and secondly, that when an order is passed as in the present case expressed to be adjudging the estate insolvent, it means in the circumstances something different from an order against the debtor. Both these assumptions are wrong. As to the first point, it is concluded by the authority of *Venkatarama Aiyar* v. *The Official Receiver, Tinnevelly*[1] and *Ramathai Anni* v. *Kanniappa Mudaliar*[2]. In those cases on facts similar to the present, the Court had passed orders adjudging the deceased debtor insolvent. The objection raised was that on the language of S. 17 as amended by the Act of 1920 there could be no order of adjudication against a dead man and it was argued that that was the effect of altering the words "as if he were alive" which occurred in the old section to "as far as may be necessary for the realisation and distribution of the property of the debtor". This contention was fully dealt with in the later case and rejected in both cases by this Court, the result being that the proper order to pass in a case like the present is to adjudge the deceased debtor and not his estate. I asked learned counsel on both sides for any rule or precedent by which an order adjudging the estate insolvent is contemplated by the Provincial Insolvency Act. They did not refer to and I am not aware of any such. It is to be noted that the Provincial Insolvency Act does not contain any provision similar to Ss. 108 and 109 of the Presidency Towns Insolvency Act corresponding to S. 130 of the English Bankruptcy Act empowering the Insolvency Court to administer insolvent estates. Therefore considerations and decisions applicable to that power must not be confused with cases falling within S. 17 of the Provincial Insolvency Act which corresponds to S. 93 of the Presidency Towns Insolvency Act and S. 112 of the English Bankruptcy Act. The form of the order of adjudication in this case is probably due to this distinction not being borne in mind. However that may be, the contention that when a debtor dies after the petition but before adjudication the powers of the Court under Ss. 53 and 54 are automatically withdrawn because the transferor being dead cannot be adjudged insolvent is clearly untenable in view of the

1. (1927) I. L. R. 51 Mad. 344: 54 M. L. J. 585.
2. (1928) I. L. R. 51 Mad. 495: 55 M. L. J. 235.

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decisions above mentioned by which I am bound. It follows that if the order of adjudication in the present case had been in terms one adjudging the debtor, and not his estate, insolvent the ground of the appellant's objection to the proceedings under Ss. 53 and 54 would disappear. Learned counsel for appellant seemed to suggest that he could still maintain his objection and base it on the changed language of S. 17 of the Act. With respect, I fail to see how he can do so except by showing that the two decisions are wrong. Not only am I bound by them but I respectfully agree with them that the change of language in S. 17 was not intended to limit by a side wind the powers of the Court in insolvency when the debtor dies after petition but before adjudication to the power of administration of insolvent estates of persons who die before the petition—a power which is not conferred on Provincial Courts of Insolvency at all. Learned counsel had to admit that the language of the section cannot have the effect of so limiting the Courts' power where the debtor dies after adjudication. If so, the words which are perfectly general cannot have a different effect merely because the debtor dies at an earlier stage—before adjudication. I am therefore of opinion that the substantial ground of the objection fails.

But the second part of the objection which is based on the form of the order remains. I have stated that the proper form of order of adjudication in the case was to adjudge the debtor himself and not his estate. I was at first inclined to give some effect to this objection. But on consideration I think I ought not to do so. The phraseology of an order is certainly important as is shown by this very case. But after all, the language used by every Court is only the vehicle of its thought and every Court is entitled to full faith and credit for its orders being understood in the way it was intended. Advantage will not be allowed to be taken of slips or errors of language due to a *bona fide* belief that the Court is adopting the form appropriate for the occasion. I have no doubt that the Judge who passed the order of adjudication intended to pass the right order but expressed himself as adjudging the estate because he thought that that was the proper way to word the order against a dead man. Either the decision in *Ramathai Anni* v. *Kanniappa Mudaliar*[1] was not then reported or was not brought to his

1. (1928) I. L. R. 51 Mad. 495: 55 M. L. J. 235.

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notice. In those circumstances I must give effect to the order in the way in which it was intended. After all if full effect is given to the appellant's objection all that follows is that the Insolvency Court has not yet passed any order of adjudication. Not only will it then be open to the Court to make a fresh order if necessary but the only effect it will have will be to throw into confusion all that may have happened in the insolvency within the last three years to which no one has taken any objection and in which the appellant has no interest whatever. The appellant's objection has really no merits and no decree or order will be interfered with on account of any irregularity or error not affecting the merits or the jurisdiction of the Court. I am therefore of opinion that the order of adjudication should be read, understood and given effect to as if the debtor himself had been adjudicated.

The appeal fails and is dismissed. There will be no order as to costs.

K. C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD WRIGHT, SIR JOHN WALLIS AND SIR DINSHAH MULLA.

Sri Chandra Churdeo and others .. *Appellants**

v.

Laldhari Prasad Singh and others .. *Respondents.*

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Sri Chandra Churdeo *v.* Laldhari Prasad Singh.

Landlord and Tenant—Occupancy rights—Proof of—Rights recognised in Khatian of 1902 *and tenants in unbroken possession—Acceptance of rent by thikadars—Effect of.*

A factory had, during their possession as thikadars, acquired by purchase the occupancy rights over certain bighas and later on transferred their interest to the predecessor-in-title of the appellants. The title of the appellants as transferees was recognised in the Khatian of 1902. In 1909 on the expiry of the earlier lease in favour of the factory, the Zemindars granted another lease in favour of three thikadars and that lease expired in 1918. In 1921, the mauza was sold to the respondents who sued to eject the appellants. The latter set up their occupancy rights and in proof produced a rent receipt dated 1912 and signed by the then three thikadars.

Held, that the receipt, which was found to be genuine, was not merely a recognition of *some* tenancy; having regard to the early recognition of the right of occupancy in favour of the factory in the Khatian of 1902 and to the unbroken sequence of their possession, the acceptance of rent amounted to a full recognition of the occupancy rights which prevailed against the purchasers of the mauza.

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*P. C. Appeal No. 101 of 1930.
Patna Appeal No. 33 of 1928.

28th July, 1932.

P. C.

Sri Chandra Churdeo v. Laldhari Prasad Singh.

Appeal No. 101 of 1930 from a decree of the High Court, Patna, dated the 8th June, 1928, reversing a decree of the Subordinate Judge of Monghyr, dated the 31st May, 1924.

The point for determination on this appeal was whether the lands in dispute were the occupancy holdings of the defendants-appellants. The Trial Judge decided this question in favour of the defendants-appellants, and held that they were occupancy raiyats. The High Court on appeal took the contrary view.

Against the decree of the High Court, the defendants preferred the present appeal to His Majesty in Council.

Dunne, K. C., with *Wallach* and *Kamlani* for appellants.—The finding of the Trial Judge that the appellants' father had been recognised as an occupancy tenant, was correct.

On the construction of the Bengal Tenancy Act, S 22, sub-sec. (3), as amended in 1907, the decisions in *Ramrup Mahto* v. *H. Manners*[1] and *John Pierpont Morgan* v. *Babu Ramjee Ram*[2] support the appellants' case, and we are not bound by the contrary view taken by the Calcutta High Court in *Raghubar Mahto* v. *H. Manners*[3].

J. Nissim for respondents.—The defendants-appellants were never recognised as tenants by the landlords, and in any event we submit that during the term of its *ijara*, the Factory or its proprietor was not competent to acquire by purchase occupancy rights: *see* the Bengal Tenancy Act, 1885, S. 22, sub-sec. (3) and the Amending Tenancy Act of 1907 and *Raghubar Mahto* v. *H. Manners*[3].

Dunne, K. C. replied.

28th July, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The action out of which this appeal arises was instituted on 30th September, 1921, and was for possession of certain lands, 48 bighas, and some odd cottahs in mauza Naya Gaon. The plaintiffs, now the first two respondents, claimed their proportionate share as purchasers under deeds of July, 1921, whereby they purchased a 12 annas' share in the mauza. Appellants, as defendants, resisted the claim for possession on the ground that the disputed lands were raiyati holdings, of which they were tenants, the title under which as transferees they held dating back many years and having been recognised

1. (1905) 4 C. L. J. 209. 2. (1920) 5 Pat. L. J. 302.
3. (1911) 13 C. L. J. 568.

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in the Khatian of 1902. For present purposes the history of the relevant village titles may be traced back to 1882, when the Zemindars, who were throughout absentee landlords, began to grant certain leases to a Mr. Crowdy, who started an indigo factory in the mauza. He or his successors may be referred to herein as the Factory, the name by which it was called being Bheriahi. The leases included a permanent lease of 23 bighas (not material in this case), on which the buildings were erected, and various other thika leases. Under these latter leases there was continuous possession by the Factory or its mortgagees or transferees until September, 1909. Some of these leases did not actually expire till September, 1910, but that distinction appears to have been overlooked. During the period in which the Factory were in possession as thikadars, they acquired by purchase the occupancy rights over the 48 bighas now in dispute, and these rights were recognised in the Khatian of 1902. On the 5th April, 1909, the appellants' father was put into possession of these rights under the circumstances now to be detailed. The Factory had granted two separate mortgages, one of 7th July, 1896, to the appellants' grandfather, who on 20th April, 1898, obtained a decree on the mortgage for Rs. 17,238-6-0 and future interest; the other mortgage was given in 1894 to certain lenders, who on 7th November, 1899, assigned it to Finlay, Muir & Co. About 1902 Finlay, Muir & Co. entered into possession as mortgagees and brought a suit for foreclosure. Disputes arose as to priority between Finlay, Muir & Co. and the appellants' predecessors. These disputes were finally compromised on the 18th March, 1909, on the terms that Finlay, Muir & Co. should convey the whole property of the Factory to the appellants' father, free of all encumbrances, for Rs. 5,000, whereupon the appellants' father was put in possession, Finlay, Muir & Co. having foreclosed with that object. A formal conveyance to the appellants' father (since deceased) was executed to give effect to the compromise on the 8th February, 1910. His rights are now vested in the appellants. Meantime, in September, 1909, the Zemindars had granted a lease as on the expiry of the Factory's leases of the 12 annas interest in the mauza to Mahant Lachman Dass and Bhauna or Mona Singh, and in November, 1909, a further lease of 2 annas to Parmeshwar Jha. A certain discrepancy in the interest so leased as compared with the entire holding may be disregarded and was not relied on at the hearing of the appeal.

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It was agreed that there was no question of parcels. These leases expired in September or November, 1918, being each for 9 years. By deeds dated the 2nd July, 1921, and the 22nd July, 1921, the proprietors of shares aggregating 12 annas sold their shares to the plaintiff-respondents, who instituted the present action on 29th September, 1921, having been refused possession by the appellants. The case was heard before the Subordinate Judge of Monghyr, who gave judgment on the 31st May, 1924. He found that the disputed lands were lands in which the Factory had acquired a right of occupancy and were not *bakasht* lands, and he decided in favour of the appellants on the ground of recognition: though he decided against the appellants on their plea that there was a custom admitting that occupancy rights could be transferred without the consent of the landlord, he held that that plea of custom was immaterial because Finlay, Muir & Co. having succeeded to all the rights of the Factory, including the occupancy rights in the lands in question, could transfer to the appellants' predecessor those occupancy rights, and being for this purpose in law immediate landlords of the raiyat, their consent (being a consent to their own act) was implied. He decided against the appellants' plea that the suit was barred by limitation; he also decided that S. 22 (3) of the Bengal Tenancy Act of 1885 did not affect the appellants' rights, nor did any principle of merger apply. He dismissed the suit by a decree dated 31st May, 1924.

This decree was on appeal set aside by the High Court of Judicature at Patna. The Judges, by a concurrent finding, held that the Factory had acquired a right of occupancy in the disputed lands by purchase from the original tenants; they agreed with the Subordinate Judge that no custom of transferability had been proved; but disagreed with him on the question of recognition and held the appellants had not been recognised as tenants. On that ground they held that the respondents were entitled to succeed. The present appeal to His Majesty in Council is from that decree.

It was not contested before this Board that if the appellants were recognised as occupancy tenants by the then thikadars, their rights of occupancy must prevail. On this decisive issue their Lordships are in agreement with the determination of the Subordinate Judge. The only document relied on by the

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appellants was a rent receipt: on its face it was dated the 13th January, 1912, and was in respect of the year, September, 1909, to September, 1910. It stated the tenant to be Babu Narain Prasad, the appellants' father, and purported to be in respect of the lands now disputed, stating the landlords to be the three thikadars, Mahanth Lachman Dass, Parmeshwar Jha and Babu Mona Singh; it purported to be signed by Lachman Dass by his own pen, and by Mona Singh and Parmeshwar Jha "by my own pen" (that is, by Mona Singh). It was countersigned by Lalji Lal, the *patwari* or village accountant. The Subordinate Judge was satisfied of the genuineness of that receipt, and their Lordships prefer his conclusion on this point to that of the Judges of the High Court. The Factory had acquired a right of occupancy in the lands, and the lands had been for many years in their possession, and then in the possession of the mortgagees, Finlay, Muir & Co., and then in uninterrupted sequence in that of the appellants or their predecessor-in-title: rent was admittedly received from the appellants or their father in respect of the permanent lease of the 23 bighas by the three thikadars; and it is difficult to believe that the latter would have acquiesced in the appellants or their predecessors retaining possession of the disputed lands all these years (as in fact was the case) without paying rent. The evidence was that Parmeshwar Jha's share was collected with his authority by the other two thikadars, and indeed he does not sign the receipts for the rent under the permanent lease. The objection that other receipts might have been produced is a two-edged argument. The High Court Judges comment on the fact that Lalji Lal was not called, but it was proved at the trial that he was dead. No one of the three thikadars came forward to deny the receipt. But if the receipt was genuine, it must, in the opinion of this Board, be not merely a recognition of some tenancy, but of a raiyati tenancy: the true effect of an act of recognition must depend on the surrounding circumstances: in the present case it was beyond question that for very many years the disputed lands were treated as lands in which the Factory had a right of occupancy. This appears clearly in the Khatian of 1902. Acceptance of rent in all the facts from the appellants or their predecessors-in-title, who held in unbroken sequence from the Factory, can only, in their Lordships' judgment, amount to a full recognition of their rights as occupancy raiyats.

P. C.

Sri Chandra Churdeo v. Laldhari Prasad Singh.

Lord Wright.

This conclusion is sufficient to dispose of the case, because the principle has been admitted in this case that recognition, apart from other grounds, is sufficient proof of title. It is unnecessary for this Board to express an opinion on the general correctness of the principle so admitted or on the question whether S. 22 (3) of the Bengal Tenancy Act, 1885, applies to the case.

In the result their Lordships are of opinion that the appeal should be allowed and the appellants have their costs of this appeal and also their costs in the Courts below, the decree of the Subordinate Judge being restored. Their Lordships will humbly so advise His Majesty.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K. J. R./S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Devessey Pathraj Kathavala by power holder, Anandaji Malsi .. *Petitioner* (Plff.)*

v.

The New Bombay Steamships, Ltd., by their agents Messrs. Kerwar & Co., Cochin, altered as per order dated 17th September, 1929, on C. M. P. No. 3659 of 1929 .. *Respondent (Defendant).*

Devessey Pathraj Kathavala v. The New Bombay Steamships, Ltd.

Bill of lading—Conditions in—"Weight, contents and value, unknown"—Effect of.

Where a bill of lading contained clauses to the effect that the "weight, contents and value, when shipped, are unknown" and that delivery "externally in good condition as received shall be" a complete delivery, the effect is that, subject to the obligation of the carrier to deliver the identical goods entrusted to him for shipment, he is not bound by the description in the bill of lading regarding the nature of the contents of the bags put on board.

New Chinese Antimony Co., Ltd. v. *Ocean Steamship Co., Ltd.*, (1917) 2 K.B. 664; *Lebeau* v. *General Steam Navigation Co.*, L. R. (1872) 8 C. P. 88 and *The British Steam Navigation Co., Ltd.* v. *Krishnaswami Aiyar*, (1920) 62 I. C. 709, referred to.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Cochin in S. C. S. No. 80 of 1927.

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*C. R. P. No. 938 of 1929. 6th April, 1932.

Devessey Pathraj Kathavala v. The New Bombay Steamships, Ltd.

N. R. Sesha Aiyar for petitioner.

Dr. V. K. John for respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner in this Civil Revision Petition. He was the plaintiff in S. C. S. No. 80 of 1927 on the file of the Court of the Subordinate Judge of Cochin, the defendant being the firm of B. M. V. Kini Brothers, agents of the Bombay Steamships, Limited. The plaintiff sued the defendant to recover the price of 5 bags of certain grains, which, he alleged, formed part of a consignment which he shipped from Bombay to Cochin in the defendant's Steamer "S. S. Indira". The allegation is that the plaintiff sent 157 bags of grains of different kinds by the said Steamer from Bombay to Cochin and that when delivery was made at Cochin there was a shortage of 2 bags of *oorid* and 3 bags of long *dhal*. In the place of the above the defendant offered 5 bags of onions. The plaintiffs declined to accept the same, and accordingly filed a suit to recover the price of 2 bags of *oorid* and 3 bags of long *dhal*. The plea of the defendant was that though in the bill of lading, in the margin the names of the particular grains said to be the contents of the bags delivered by the plaintiff to the defendant are mentioned, yet the bill of lading contains the statement " weight, contents and value, when shipped, are unknown," and that delivery by the company of packages " externally in good condition as received shall be conclusive evidence of the delivery of the full weight and contents " and that the defendant was not liable. The learned Judge who tried the suit came to the conclusion that the five bags in question contained the marks of the plaintiff. In the mate's receipt (which was granted to the plaintiff when the goods were taken into the ship along with the boat-note and after the same were accepted by the person who took charge of the same) mention was made that the consignment is "said to be" of particular grains. In exchange for the mate's receipt, a bill of lading was given to the plaintiff in the usual course, and, as already remarked, in the margin of the bill of lading there is a description of the number of bags and of the particular grain which the bags were said to contain. Being of opinion that the company was not conclusively bound by the mention in the margin of the bill of lading of the particular kinds of grains the bags were said to contain, and that the company was discharged of its obligations by delivery to the plaintiff of the

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total number of bags containing the initials (marks) of the plaintiff, the learned Subordinate Judge dismissed the plaintiff's suit. The plaintiff has preferred the present Civil Revision Petition.

On plaintiff's behalf his learned advocate drew my attention to the Import Manifest and the Outturn Report which have been exhibited as Exs. C and D in this case and he emphasised upon the duty that the Master of the ship was under to give to the harbour authorities, a correct description of the goods landed in any particular harbour. It was argued that having regard to the description of the goods in Exs. C and D it must be taken that the goods that were actually carried from Bombay to Cochin were goods of the description mentioned in the margin of the bill of lading. He also contended that there must be a specific finding on the question whether the five bags in dispute were the identical bags that were shipped by the plaintiff at Bombay. On behalf of the respondent the learned counsel who appeared for the company drew my attention to the mate's receipt as well as to the contents of the bill of lading. The mate's receipt only stated that so many bags were received which were "said to contain" particular grains, and there were the conditions in the bill of lading already mentioned by me, namely, "the nature of the contents unknown," and, "delivery by company of packages externally in good condition shall be conclusive evidence of the delivery of the full contents". The learned counsel also strongly relied on the circumstance that the learned Judge has found that those five bags contained the plaintiff's marks under which the consignment was shipped by the plaintiff.

It seems to me that one thing is clear, that the company was bound to deliver the exact bags that were shipped at Bombay, subject of course to the conditions and exceptions contained in the bill of lading, and that the company was not entitled to take advantage of any misdescription of the goods with a view to withhold from the plaintiff the exact bags that were actually shipped by the plaintiff. If, for example, the description of the bags was that they contained grains of an inferior quality but it was proved that the grains contained in the bags were of a superior quality, it is not open to the company to say that they would deliver to the plaintiff only grains of an inferior quality. In fact, subject to the exceptions

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and conditions mentioned in the bill of lading relating to loss by perils of the sea, etc., the company is bound to deliver the identical bags that were shipped at Bombay by the plaintiff to be carried to Cochin. The argument that was advanced on behalf of the petitioner is, that both in the boat-note (which however has not been produced in this case) and in the bill of lading itself, there is a specification in the margin of the number of bags shipped and of the contents of the same (the names of the particular grains which the bags contained being specified there) and therefore the onus is upon the defendant company to prove that those descriptions were wrong. It is clear that the marginal notes to the bill of lading did not mention "onions," and the five bags in question offered to the plaintiff at Cochin were bags which contained "onions". What then is the effect of the specification in the margin of a bill of lading of the description of the goods, which, according to the merchant, truly represented the quality and quantity of the goods that were shipped, when considered along with the clause in the bill of lading, namely, " the contents, weights and value unknown, etc." This question came up for consideration before this Court in the case reported in *The British Steam Navigation Company, Ltd.* v. *Krishnaswami Aiyar*[1]. There the receipt that was granted to the shipper contained the words "said to contain" such and such goods. There was also the other usual clause, namely, "contents and weight unknown". On those facts the learned Judge who tried the suit on the Original Side of this Court came to the conclusion that the company was bound to deliver the goods specified in the circumstances. That decision, however, was reversed by a Bench of this Court consisting of Sir John Wallis, C. J. and Krishnan, J. The learned Judges held that such questions had been decided in England and that the real meaning to be attached to such shipping documents was that the shipping company was not prepared to accept the description given by the merchant, and that for their purpose of determining the freight due to them they were prepared to accept the classification and the weight mentioned by the merchant. After referring to the course of business in such matters, namely, that the shipper takes a boat-note, delivers the goods to some person in charge on the ship and gets a mate's receipt for the goods, and then in exchange for the same gets

1. (1920) 62 I. C. 709.

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a bill of lading from the agent or the Master of the ship in the usual course, the learned Judges made the following observation:—

"Reliance was placed upon the mate's receipts and the bill of lading as shifting the burden on to the defendant company. The mate's receipts expressly say 'said to be' so many bags. When the shipping company takes care to give a receipt of that sort so that it may not be used as an admission against them as to the number of bags received by them, it seems to me that there is no justification for using it as making out a *prima facie* case as to the number of bags actually put on board."

There the question was as regards the weight and the number of bags,—not, as in the present case before me, as regards the contents. But the same remark as regards the words "weight not known" occurring in such bills of lading would also apply, in my opinion, to the other portion of the bill of lading, namely, "contents not known". A similar question arose for decision in *New Chinese Antimony Company, Ltd.* v. *Ocean Steamship Company, Ltd.*[1] The action was there tried by Sankey, J.—as he then was—and he held that the shipowner was liable. On appeal the Court of Appeal reversed that decision and took occasion to remark as what would be the exact significance in law of such a condition occurring in a bill of lading. Viscount Reading, Chief Justice, at page 669 observed as follows:—

"I think that the true effect of this bill of lading is that the words 'weight unknown' have the effect of a statement by the ship-owners' agent that he has received a quantity of ore which the shippers' representative says weighs 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only."

Then the remarks of Brett, J., in *Lebeau* v. *General Steam Navigation Company*[2] are quoted, which seem to be apposite for the present case. This is what that learned Judge said in the case in *Lebeau* v. *General Steam Navigation Company*[2] at page 96:

" When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business, and it seems from the American cases, to be the law, that he thereby declines to accept the declaration of the shipper; he says in effect, 'I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it'. It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of

1. (1917) 2 K. B. 664. 2. (1872) L. R. 8 C. P. 88.

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lading in the modified form by which there is no binding statement as to the contents of the package."

Scrutton, L. J., put the following illustration at page 673:—

"Suppose a box, described as a 'box of jewels,' were deposited for safe custody at a bank, and a receipt were given for it in the words 'received, contents unknown,' there would be no evidence of the receipt of any jewellery."

Having regard to the well-recognised interpretation which these and similar words occurring ordinarily in bills of lading have received, I think that the description in the bill of lading in question in the margin that the bags contained grains of particular description is not conclusively binding on the defendant. No doubt the defendant is bound (subject to the exceptions and conditions mentioned in the bill of lading) to deliver at Cochin the bags that were handed to him by the plaintiff at Bombay. As regards the identity of the bags, one of the defendant's witnesses gave evidence to the effect that the five bags in question contained the marks of the plaintiff. He was not cross-examined with reference to that point, and the learned Judge states that the bags in question had plaintiff's marks on them and that in the absence of any other suggestion the bags in question should be taken to be among the bags that were tendered to the defendant at Bombay.

For the foregoing reasons I think that the judgment of the learned Judge is not shown to be incorrect, and the Civil Revision Petition is dismissed with costs.

S. R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Pena Rina Yena Manickavasagam Chettiar .. *Petitioners* in both (Plff.)*

v.

The Union Board of Devakottah, through its President O. R. M. M. S. M. Manickavasagam Chettiar *alias* Sevugan Chettiar. *Respondent in both (Deft.).*

Manickavasagam Chettiar *v.* The Union Board of Devakottah.

Madras Local Boards Act (XIV of 1920), S. 93 (prior to amendment of 1930)—Scope of—Double taxation—How far allowed.

As regards double taxation, S. 93 of the Local Boards Act (as it stood before the Amending Act, XI of 1930) only provides that an income derived

*C. R. Ps. Nos. 382 and 383 of 1932. 3rd March, 1932.

Manickavasagam Chettiar v. The Union Board of Devakottah.

from a source otherwise taxable within the area must not be taxed twice. But if the lands and houses be outside the area, the income therefrom, if received within the local limits of the Board, is taxable whether it has been taxed elsewhere or not.

Petitions under S. 115 of Act V of 1908 praying the High Court to revise the decrees of the Court of the Temporary Subordinate Judge of Devakottah in A. S. Nos. 15 and 22 of 1927 (Appeals Nos. 281 and 286 of 1927 on the file of the District Court of Ramnad) preferred against the decrees of the Court of the District Munsif of Devakottah in O. S. No. 48 of 1926 in O. S. No. 559 of 1924.

T. M. Krishnaswami Aiyar, M. Subbaroya Aiyar and *K. Ramanadhan Chettiar* for petitioner.

T. R. Srinivasan for *K. Bhashyam Aiyangar* for respondent.

The judgment of the Court was delivered by

Waller, J.

Waller, J.—In this case two second appeals were originally filed. It is obvious that the matter involved was of a small cause nature and therefore the appeals do not lie. Two applications were filed to convert the appeals into civil revision petitions which were allowed.

The question involved is as to the collection of profession-tax from the petitioner by the respondent, the Union Board of Devakottah. The petitioner lives within the area of the Union Board, but carries on a money-lending business at Madras, Mannargudi and Nellore. His contention is that, as he has already paid the profession-tax on the income from his business in those places, he is not liable to pay again on it at his place of residence. He pleads, in fact, that income cannot be received as income twice over. That is a contention we have rejected in our judgment in *Perianan Chetti* v. *Taluk Board, Devakottah*[1]. We reject it again for the reasons given in our judgment in that case. His next contention is that it is contrary to the policy of the Local Boards Act to tax a man twice over on his income from the same business. That contention we cannot accept. The relevant section of the Act of 1920 is S. 93. The petitioner is a person "who, within such area . . . is in receipt of an income from money-lending or any source other than houses and lands inside the local limits of the area". As

1. (1932) I. L. R. 55 Mad. 848: 63 M. L. J. 148.

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Waller, J.

regards double taxation all that the Act indicates is that an income derived from a source otherwise taxable within the area must not be taxed there twice. If the assessee derives an income from houses and lands within that area, that is otherwise taxable within the area and must not be taxed again. But let his lands and houses be outside the area and it is obvious that his income from them, if it reaches Devakottah, will be taxable there under S. 93 whether it has been taxed elsewhere or not. The only cases in which double taxation is not allowed are specified in sub-sec. (3) and the petitioner's is not one of those cases. Under the present Act—the Act of 1930—the exceptions are much wider and the petitioner would not be taxable at all at Devakottah. In the result, we must dismiss the civil revision petitions with costs, on the finding that the petitioner is taxable. No question as to the amount of the tax was argued before us.

S. R. *Petitions dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON, MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Trivikrama Konuraya .. *Appellant** (*1st Deft.*)

v.

Sankaranarayana Vazhunnavar and others .. *Respondents* (*Plffs*).

F. B.

Trivikrama Konuraya v. Sankaranarayana Vazhunnavar.

Malabar Law—Karnavan—Powers—Renewal of kanom before expiry of prior demise—Validity—Grantor being alive after expiry of previous term—Failure to disavow renewal—Effect.

A Karnavan of a Malabar tarwad has the power to grant a renewal of a kanom for a proper term and on proper conditions a reasonable time before the expiry of the prior demise; and the length of time which is reasonable will vary with the circumstances of each case. Even if the renewal is made unreasonably long before the current term, his act is not void but only voidable, either at his own instance or at the instance of the succeeding Karnavan. In such a case, if the Karnavan who granted the renewal is in office at the date of the expiry of the previous term, but does not disavow the transaction, it holds good.

Per Jackson, J—On the facts of the case the Karnavan may be presumed to have ratified the kanom which he prematurely granted.

Unreported Judgment of the Madras High Court in S. A. No. 774 of 1917 approved.

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*S. A. No. 1199 of 1928. 17th March, 1932.

F. B.

Trivikrama Konuraya *v.* Sankaranarayana Vazhunnavar.

Observations of Sadasiva Aiyar, J. in *Kunhammad* v. *Kunhunni*, (1920) I. L. R. 43 Mad. 715: 38 M. L. J 461, no followed.

Cheria Chenkandan v. *Krishnan Nambiar*, (1914) 27 M. L. J. 690 and *Abdulla Koya* v. *Eacharan*, (1917) 35 M. L. J. 405, referred to.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in Appeal Suit No. 272 of 1927 (A. S. No. 3 of 1927, District Court, South Kanara) preferred against the decree of the Court of the District Munsif of Kasargod in Original Suit No. 420 of 1925.

O. T. G. Nambiar and *A. Achuthan Nambiar* for appellant.

P. Govinda Menon for respondents.

The Court delivered the following

Jackson, J.

JUDGMENTS. *Jackson, J.*—I have had the advantage of reading the judgments which are about to be delivered, and will confine myself to saying that on the facts of the present case I think that the Karnavan may be presumed to have ratified the kanom which he prematurely granted.

Inasmuch as the defendant never clearly raised the point on which he has succeeded till second appeal, we think that the parties must bear their own costs throughout.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—The suit properties belong in Jenm to the Thazhakkat Mana of which the 6th defendant is the Karnavan. The then Karnavan of the Mana demised the suit properties on kanom to the 1st defendant's Karnavan (Raman) under Ex. II, dated 6th June, 1910 (it was renewal of a prior kanom). The same Karnavan executed in favour of the said Raman Ex. III on 20th April, 1919, by which Raman was authorised to hold the properties for a period of twelve years from 6th June, 1922, the date on which the period of twelve years under Ex. II would expire. The karnavan who executed Ex. III died in Vrichikam 1098 (November-December, 1922). The 6th defendant who then became the karnavan of the Mana granted the Melkanom deed, Ex. A, to the plaintiff on 28th May, 1923. The plaintiff instituted the original suit in 1925 for redemption of the demise of 1910 (Ex. II). Defendants 2 to 5 were tenants in possession under the 1st defendant, and neither they nort he 6th defendant—the karnavan of the Jenmi's Mana—contested the suit. The plea of the contesting defendant No. 1 was that the renewal evidenced by Ex. III was valid and binding on the 6th defendant and on the plaintiff. Both the Lower Courts held against that contention

F. B.

Trivikrama Konuraya v. Sankaranarayana Vazhunnavar.

Anantakrishna Aiyar, J.

of the 1st defendant and granted a decree for redemption in favour of the plaintiff. The 1st defendant has preferred this second appeal.

This second appeal was referred to this Bench owing to the conflict of decisions in S. A. No. 774 of 1917 and *Kunhammad* v. *Kunhunni*[1].

It may be mentioned at the outset that the demise under Ex. III is not of a right to hold the properties for a period of twelve years from its date. It is not a case where a kanomdar surrenders the unexpired portion of the term under the prior kanom under which he is holding and the Jenmi accepting the same grants a kanom to have operation for a period of twelve years from that date (date of renewal), in which case different considerations would apply. A perusal of Ex. III makes it clear that the grantee under it (Raman) did not give up any portion of the term under Ex. II, but the grantee is to have the full period of twelve years under Ex. II which would expire on 6th June, 1922, and also twelve years under Ex. III from 6th June, 1922 to 6th June, 1934.

The plaintiff's contention is that Ex. III which was executed three years and one and a half months before the expiry of the period of the prior kanom under Exhibit II is invalid, whereas the 1st defendant's plea before us is that as the Karnavan who granted Ex. III was alive on 6th June, 1922 (the date when the term under Ex. II expired) but died only about 5 months later, Ex. III is binding on the 6th defendant —the next Karnavan.

The learned Subordinate Judge disposed of the question as follows:—

"It is clear law that Ex. III which was a renewal granted more than three years before the expiry of the prior demise is invalid unless the 1st defendant is liable to prove that this renewal was absolutely necessary for the family purpose of the Thazhakkat Mana. . . . The 1st defendant and his witnesses have not been able to make a convincing case that there was any necessity for the illom to grant this melkanom before time. I agree with the Lower Court that the necessity for the grant of this melkanom has not been proved, and that the renewal by Ex. III is therefore invalid."

It was argued before us that in S. A. No. 774 of 1917 a Bench of this Court consisting of Phillips and Krishnan, JJ., held as follows:—

"The grant of the melcharth four years too soon might well be ground for declaring it not to be binding on the grantor's successor, if the grantor

1. (1920) I. L. R. 43 Mad. 715 : 38 M. L. J. 461

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died before the period of the prior kanom had expired as held in *Cheria Cherikandan* v *Krishnan Nambiar*[1]; but in this case the grantor died after the prior kanom had expired and was thus in a position to grant the melcharth, provided that the grant was not of such a nature as to improperly prejudice the successor. We cannot therefore hold that the plaint melcharth is invalid as improperly prejudicing the successor."

On the other hand, we are referred to *Moidin Kutti* v. *Kunhi Koyan*[2], where the learned Judges Ayling and Hannay, JJ., held that

"This transaction is not binding on the successor of the karnavan who executed it whether the latter did or did not survive the expiry of the prior kanom."

The finding as regards the melcharth in question in that case was this: that "the karnavans and managers of Malabar tarwads have no power to grant melcharth in respect of tarwad properties except for pressing family necessities, and that there was no tarwad necessity for the execution of the melcharth—Ex. B—which was intended by the 3rd defendant's mother simply to accommodate her insolvent son" (page 692). The headnote of the report seems to be too wide when it states that "in the absence of necessity, a melcharth given before the expiry of the prior lease will not bind the succeeding karnavan whether the grantor was or was not alive at the time the prior lease expired".

In *Kunhammad* v. *Kunhunni*[3] Justice Sadasiva Aiyar observed that

"A karnavan's ordinary legal right is that of management over the tarwad affairs and properties and, in my opinion, it is difficult to hold that four years before a lease expired, it is the proper thing or an ordinary incident of management to grant a second lease to begin on the expiry of the former lease. That was the principle on which *Cheria Cherikandan* v. *Krishnan Nambiar*[1] was based. It is only where proper necessity or justification can be urged to invoke what can be called the extraordinary powers of dealing with the property (which is being held by tenants under a lease which has not expired) that such an action can be held valid against the tarwad. It is also significant that this contention that necessity need not be shown where the karnavan continues in power at the expiry of the first lease seems not to have been argued before the lower appellate Court but was raised for the first time in the Second Appeal memorandum."

The learned Judge expressed dissent from the decision in S. A. No. 774 of 1917. In the same case, Justice Spencer remarked:

"In the present case where no explanation has been offered for anticipating the time of renewal of the lease by four years, it is difficult to see how the 5th defendant's conduct can be justified". See *Kunhammad* v. *Kunhunni*[3].

1. (1914) 27 M. L. J. 690. 2. (1914) 27 M. L. J. 691.
3. (1920) I. L. R. 43 Mad. 715 at 719: 38 M. L. J. 461.

It may be remarked that in the case in *Kunhammad* v. *Kunhunni*[1] the property had been leased to the defendant in 1891, that the twelve years term would expire in 1903, that in 1899 the Karnavan granted a fresh lease in favour of the old tenant, that in 1903, there was a kanom granted by the same Karnavan in favour of the assignees of the old tenant and also a porankadom in 1905. The plaintiff succeeded the previous Karnavan in 1907, and the suit was filed in 1911 on the basis of the lease granted in 1891. It would seem that the Karnavan who granted the lease in 1899 himself did not stand by the same when the term of the prior lease expired in 1903, for we find that the same Karnavan granted a kanom in 1903 to the representatives-in-interest of the old tenants, who accepted the kanom.

However, there are the observations of the learned Judge, Sadasiva Aiyar, J., quoted above, in which the learned Judge dissented from the decision of the learned Judges in S. A. No. 774 of 1917. Sadasiva Aiyar, J., purported to follow the decision in *Cheria Cherikandan* v. *Krishnan Nambiar*[2], a decision of Sundara Aiyar and Sadasiva Aiyar, JJ., where it is observed:

"Here, the karnavan, two years in advance of the expiration of the prior lease, executed a melcharth in plaintiff's favour. No justification has been pleaded for such an act. It is not alleged that there was any necessity for doing so, or that the tarwad derived any benefit from the transaction."

On a reference to the printed papers in that case, *Cheria Cherikandan* v. *Krishnan Nambiar*[2], it appears that the Karnavan who granted the melcharth died after the melcharth and before the expiry of the term of the prior demise. The observations made by the learned Judges should be taken in conjunction with that circumstance. It may also be stated that in S. A. No. 837 of 1914, Sir John Walls, C. J. and Ayling J., observed as follows:—

"We do not think that the learned Judges who decided *Cheria Cherikandan* v. *Krishnan Nambiar*[2] intended to lay down that a subsequent karnavan could not accept and act on a melcharth granted by his predecessor before the end of the existing term. All that was laid down, as we understand, was that such an attempt to fetter the discretion of the subsequent karnavan was not binding on him. In the present case we think that the next karnavan affirmed the transaction by the acceptance of an enhanced rent after succeeding to the office."

It may be taken for granted that generally it is within the ordinary powers of the Karnavan of a Malabar tarwad to demise

1. (1920) I. L. R. 43 Mad. 715: 38 M. L. J. 461.
2. (1914) 27 M. L. J. 690.

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properties on kanom, and also to grant renewals of such properties to enure for a period of twelve years from the date of renewal. This right on the part of the Karnavan is attributed to the power of management of the tarwad properties which in law is vested in him. A term of twelve years has been held to be proper in such cases having regard to the conditions and custom of Malabar. Any demise by which a term for a longer period than twelve years is granted would *prima facie* not be considered as coming with the Karnavan's ordinary powers; nor would the raising of a ludicrously large amount—though nominally charged as "kanom" on the properties—be held to be binding on the tarwad, if the amount was raised in reality as a debt, so as merely to have cash at the disposal of the Karnavan, rather than as a kanom as ordinarily understood, since he could not bind the tarwad by raising new mortgage debts by simply calling them "kanom", in the absence of other justifying circumstances. The right of a Karnavan to grant kanom demises would also be limited to particular kinds of tarwad properties which he has to manage, and would not ordinarily extend to his granting on kanom, for example, the tarwad house in which the members are living, and such a kanom demise would not be held binding on the tarwad simply because it is only a demise for a term of twelve years. Even with reference to properties under his management, there may be particular circumstances which may disentitle the Karnavan to grant kanom demises in respect of particular properties. Speaking generally it may be said that the grant of tarwad properties on kanom is an ordinary incident appertaining to the right of management possessed by the Karnavan. A Karnavan, therefore, having the right to manage the tarwad affairs (and having the corresponding obligation to manage the tarwad properties) is entitled in his discretion to decide which properties to demise on kanom and which demises to renew—other terms and conditions relating to renewal fee, fixing of porappad, etc., not being objectionable. The Karnavan is *prima facie* the best person to decide when to grant a kanom and when to grant a renewal. To say that a Karnavan could settle the matter and execute the deeds only after the expiry of the term of the prior demise is to say that he should be deprived of reasonable forethought, circumspection and previous consideration of the question. It may not, in many cases, be possible to find a new

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tenant at the spur of the moment. One should not forget that in Malabar a kanomdar would be entitled to compensation for improvements effected by him, and he could not be redeemed or ejected before the amount of such compensation is paid to him. The tarwad may not have funds for the purpose, and the new kanomdar (melcharthdar), or lessee, should be one not only able to properly cultivate the land but also able to pay off the kanom and value of improvements due to the old kanomdar or lessee, as the case may be. If an owner is entitled to make proper arrangements reasonably in advance with reference to management of his property, *prima facie*, the Karnavan who represents the owner should have the same rights. To say that the Karnavan could grant a melcharth or renewal one week before the expiry of the prior demise but could never do the same one year before, is to lay down a rigid artificial rule on a matter the solution of which will largely depend upon circumstances. It would therefore seem that to make the validity of the renewal or melcharth depend solely on the point of time that intervened between the same and the expiry of the period of the prior demise is attacking the problem from a wrong end.

"The Karnavan is not a mere trustee of the tarwad" (*Vasudevan* v. *Sankaran*[1]).

"A Karnavan is not a trustee" (*Kenath Puthen Vittil Tavazhi* v. *Narayanan*[2]).

"The powers of the Karnavan are essentially powers of management" (*Raman Menon* v. *Raman Menon*[3]).

"The members of a tarwad have the right to prevent the Karnavan from wasting or improperly alienating the tarwad property" (*Vasudevan* v. *Sankaran*[1] and *Manavadan* v. *Sredevi*[4]).

"An alienation made by a Hindu widow under circumstances which would not bind the reversioner is not void; it is only voidable at the instance of the reversioner" (*Raja Modhu Sudan Singh* v. *Rooke*[5] and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[6]).

An alienation made by a Karnavan in similar circumstances would also be only voidable and not void (*Abdulla Koya* v.

1. (1897) I. L. R. 20 Mad. 129 at 133 and 141 : 7 M. L. J. 102 (F. B.).
2. (1904) I. L. R. 28 Mad. 182 at 195: 14 M. L J. 415 (F. B.).
3. (1900) L.R. 27 I.A. 231 : I.L.R. 24 Mad. 73 at 80 : 10 M.L.J. 245 (P.C.).
4. (1926) I. L. R. 50 Mad. 431 at 437 : 52 M L. J. 277.
5. (1897) L. R. 24 I. A. 164 : I. L. R. 25 Cal. 1 : 7 M. L. J. 127 (P.C.).
6. (1907) L.R. 34 I. A. 87 : I. L R. 34 Cal. 329 : 17 M.L.J. 154 (P. C.).

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Eacharan Nair[1]; *Pilakkatan Chettiotan* v. *Vashakarambath Moidin*[2].

The distinction is important, since a void transaction could not be ratified by the persons affected, whereas a voidable transaction could be so ratified by the persons prejudicially affected by the same.

Melcharth or renewal in advance and by way of anticipation would be open to objection by the other members of the tarwad if it is proved that having regard to circumstances the particular transactions were prejudicial to the interests of the tarwad and that the Karnavan was sacrificing or really prejudicing the interests of the tarwad in those cases by the sole desire to raise money for misappropriation or with ulterior motives. Just as the other terms of a demise (whether melcharth or renewal) could be proved to be seriously prejudicial to the interests of the tarwad having regard to the circumstances, the entering into such a transaction prematurely may also be complained of by the other members of the tarwad. As observed by Phillips and Devadoss, JJ.:

> "It is undoubtedly important to bear in mind the impossibility to predict some years in advance what the state of affairs will be when the original kanom expires and what incidents should be imposed in order to make the demise beneficial to the tarwad."

See *Koppassa Menon* v. *Kalliani Ammal*[3]. Nor should the consideration be ignored that "if a Karnavan grants a melcharth or renewal before the expiry of the term of the kanom, he is practically fettering the discretion of the person who may hold the office at the time of the expiry of the kanom." *Vatavatta Nair* v. *Kenath Puthen Vittil Kuppassan Menon*[4]. (Abdur Rahim and Seshagiri Aiyar, JJ.). But none of these considerations would, in my opinion, be conclusive by themselves to justify such melcharth and renewal documents being set aside, irrespective of all other considerations. An alienation by a Karnavan could be questioned by the other members of the tarwad where the same is not for necessary or justifiable purposes. A lease is an alienation; but, when granted in the ordinary course of management, it would be binding on the tarwad unless it be shown that in any particular case, having regard to its terms, etc., the same is not binding on the tarwad. A melcharth or renewal before the expiry of the term of the

1. (1917) 35 M L. J. 405. 2. (1916) 34 I. C. 755.
3. (1923) 45 M. L. J. 258 at 261.
4. (1918) 36 M. L. J. 630 at 633.

prior demise could of course be shown to be not binding upon the tarwad in particular cases. The terms thereof may be prejudicial to the interests of the tarwad, the Karnavan of the tarwad might have granted the demise at a time when his private personal interests were the only motive for granting the same,—the tarwad interests, pointing in the other direction, being sacrificed,—and the demisee also being a party to the same. But when no other objection is taken to such a demise except that it was granted some time prior to the expiry of the term of the prior demise, without showing anything else to the prejudice of the tarwad, I am unable to see how that one circumstance should be taken to be conclusive against the validity of the demise, when the Karnavan who granted the same was alive and in management when the term of the prior demise expired, and was quite satisfied with the same.

It may be stated for what it is worth that the porappad in the renewal—Ex. III—in question in the present case is five seers of paddy more than that stipulated in Ex. II; but that by the way is only a nominal addition to the porappad and is not very material otherwise, and should not be taken in any way to conclude the matter, since it is well known that such nominal additions to the porappad are made with a view to give the demise *prima facie* an apparent basis and justification to make it binding on the tarwad.

It could not be, and in fact was not, disputed that it would be a very proper thing for a Karnavan to make arrangements reasonably in advance with reference to the letting of property —say a week—before the actual expiry of the term of an outstanding lease; such arrangement, if otherwise proper, could not be characterised as improper simply because the Karnavan who made the same happened to be dead by the time the term of the prior lease expired. In such a case, it could not be held that the circumstance that the Karnavan did not survive the date of expiry of the prior lease would, *ipso facto*, invalidate the melcharth granted by him. The melcharth is binding on the Karnavan who granted the same unless it has been disaffirmed by him on behalf of the tarwad (assuming that he could do so); the circumstance that the Karnavan survived the date of the expiry of the prior lease without disaffirming the same is very important in the consideration of the question.

As the transaction entered into by him is *prima facie* binding upon him, the argument that after the expiry of the

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term of the prior lease, he (the executant) should indicate, by some formal act of his, that he proposes to stand by the same, is too technical, even if there is any force in it. When the question of its binding nature is raised subsequent to the executant's death by the succeeding Karnavan, the circumstance that the executant—karnavan—was alive when the term of the prior demise expired, and could have on that date executed a document in similar terms against which nothing could be urged, is a very material point for consideration in the absence of other circumstances. Ordinarily, a document being binding on the executant thereof, no further act of his would be necessary to affirm it; it is only when he wishes to disaffirm it (in cases where he could do so) that he should indicate by an overt act, his disavowal. Further, any slight act of his which is inconsistent with his disavowal of the document would be taken as affirmation of the document by him, even in cases where such subsequent affirmation is necessary.

A deed of further assurance could be directed to be executed in proper cases, when the same is deemed necessary and proper to complete and give full effect to the original agreement and intention of the parties to a transaction.

Even if the melcharth or renewal in such cases be treated only as an agreement to grant a proper demise or renewal, then, if the Karnavan who executed the same and entered into the said agreement be alive, at the date of the expiry of the term of the prior demise, the question whether a suit for specific performance of such an agreement would be successful in any particular case will have a relevancy in cases like the one before us. In cases where the specific performance of the agreement would be decreed by the Courts having regard to the terms and conditions of the melcharth or renewal, then, there is no sufficient reason, in my opinion, why the already existing instrument (melcharth or renewal)—duly executed and registered—should not be taken to be sufficient for the purpose intended. In the case before us, as already mentioned, the renewal in question is not alleged to be open to any other objection, and my remarks are intended to cover only such cases.

I do not, however, propose to base my judgment on the above line of reasoning in the present case, as here the Karnavan was alive at the time of expiry of the prior term and all

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persons interested were quite satisfied with the arrangement already made.

I am not suggesting that the executant—karnavan—could never himself disaffirm such a melcharth after the date of the expiry of the term of the prior lease—, I assume that he could do so on proper grounds.

In the case before us, the finding of the lower appellate Court—in the passage extracted already—is that "this renewal was not absolutely necessary for the purpose of the Mana, and the necessity for the grant of this Melkanom has not been proved and that the renewal of Ex. III is therefore invalid and is unsustainable". The terms and conditions of the renewal Ex. III have not been called in question as in any way prejudicial to the Mana, nor has it been suggested on behalf of the Mana that the previous karnavan should have redeemed the kanom and reduced the properties to actual possession for direct cultivation by the Mana. The finding is based on the sole circumstance that the renewal was granted before the expiry of the term of the prior demise. No other circumstances have been proved, nor has any evidence been adduced that the tarwad in fact was prejudiced by this anticipatory renewal. Any such suggestion is *prima facie* rebutted by the circumstance that the same karnavan was alive for about five months after the expiry of the term of the prior lease.

It is on the observations made by the learned Judges in *Cheria Cherikandan* v. *Krishnan Nambiar*[1] that reliance was placed in the subsequent case reported in *Kunhammad* v. *Kunhunni*[2]. A reference to the printed papers in the case reported in *Cheria Cherikandan* v. *Krishnan Nambiar*[1] has disclosed the fact that the karnavan who executed the document in question had died prior to the expiry of the term of the prior demise. Therefore the decision in *Cheria Cherikandan* v. *Krishnan Nambiar*[1] does not really apply to the case before us. The headnote of the case reported in *Moidin Kutti* v. *Kunhi Koyan*[3] goes, in my opinion, farther than the actual decision, having regard to the findings arrived at by the Lower Court in that case and the observations in the judgment of the High Court. In *Kunhammad* v. *Kunhunni*[2] the karnavan who granted the premature renewal of the lease, himself granted a

1. (1914) 27 M. L. J. 690. 2. (1920) I.L.R. 43 Mad. 715 : 38 M.L.J. 461. 3. (1914) 27 M. L. J. 691.

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kanom to the same lessees in the very year in which the term of the prior demise expired and the lessee accepted the same,—all this would *prima facie* be inconsistent with the renewed lease being taken to be valid and in force though on the merits the kanom was found by the Court to be not binding on the tarwad. There are no doubt the observations of the learned Judge, Sadasiva Aiyar, J., in the case reported in *Kunhammad* v. *Kunhunni*,[1] which support the respondent's contention. On the other hand, we have got the decision of Phillips and Krishnan, JJ., in S. A. No. 774 of 1917 which supports the appellant's contention.

As already mentioned, such melcharths and renewals are not void but only voidable at the instance of the tarwad. See *Abdulla Koya* v. *Eacharan Nair*[2] and *Pilakkatan Chettiotan* v. *Vazhakarambath Moidin*[3]. In *Abdulla Koya* v. *Eacharan Nair*[2] Oldfield and Phillips, JJ., made the following observations with reference to the cases in *Cheria Cherikandan* v. *Krishnan Nambiar*[4], *Raman Nambiar* v. *Raman Nambiar*[5] and *Moidin Kutty* v. *Kunhi Koyan*[6]:—

" These cases are however only authority for holding that a melcharth granted by a karnavan before the expiry of the previous term will not bind his successor and not that such melcharths are necessarily invalid *ab initio*."

It was stated that it has been ascertained by a reference to the printed papers that the karnavans who granted the melcharth or renewal were not alive when the term of the prior demises expired in the case reported in *Raman Nambiar* v. *Raman Nambiar*[5]. That was evidently so also in S. A. No. 877 of 1911, where Sundara Aiyar and Sadasiva Aiyar, JJ., followed their decision in *Cheria Cherikandan* v. *Krishnan Nambiar*[4].

I should note that Justice Ayling was a party to the decision in S. A. No. 837 of 1914, where the Court (Sir John Wallis, C. J., and Ayling, J.) observed that

"all that was laid down in *Cheria Cherikandan* v. *Krishnan Nambiar*[4], as we understand, was that such an attempt to fetter the discretion of the subsequent karnavan was not binding on him."

This was the view taken of the decisions in *Cheria Cherikandan* v. *Krishnan Nambiar*[4] and *Moidin Kutti* v. *Kunhi Koyan*[6] by Oldfield and Phillips, JJ., in *Abdulla Koya* v.

1. (1920) I. L. R. 43 Mad. 715: 38 M. L. J. 461.
2. (1917) 35 M. L. J. 405 at 406.
3. (1916) 34 I. C. 755.
4. (1914) 27 M. L. J. 690.
5. (1914) 27 M. L. J. 175.
6. (1914) 27 M. L. J. 691.

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Eacharan Nair[1]. At page 406 the learned Judges observed that "these cases are however only authority for holding that a melcharth granted by a karnavan before the expiry of the previous term will not bind his successor."

The lower appellate Court in the present case has, in my opinion, misdirected itself on the law governing the consideration of the question involved in the case.

For the reasons already mentioned, I am of opinion that the finding of the learned Subordinate Judge in the present case cannot be accepted.

It may be remarked that having regard to the provisions of the Malabar Tenancy Act (XIV of 1930) the main incident attached to a melcharth that the melcharthdar could obtain possession from the prior demisee has been taken away by the Legislature, which has also granted fixity of tenure and right of renewal to tenants in possession, under circumstances detailed in the Act. Though a melcharth would still give a melcharthdar some other rights vested in the jenmi, the unrestricted right to obtain possession from the old tenant has been taken away from the melcharthdar since the tenant has been given right to obtain renewal, etc., by the provisions of the Act. The question that has been discussed in this case is therefore not of very much practical importance in cases governed by the Malabar Tenancy Act.

The result therefore is that the second appeal is allowed and the suit dismissed, but without costs in the circumstances.

Reilly, J.

Reilly, J.—I agree that this appeal must be allowed.

This case relates to a renewed kanom of 1919 and a melkanom of 1923 granted by successive karnavans of a Nambudri illom in the south part of South Kanara. It is not disputed that the law to be applied, so far as it varies from the general law of the Presidency, is the law which was applicable in such matters to karnavans of illoms and tarwads in Malabar before the Malabar Tenancy Act, 1930, came into force and which, so far as illoms are concerned, is still applicable in South Kanara. For the purpose of this case it will be convenient to speak of that law as Malabar Law, putting the effect of the Malabar Tenancy Act upon it out of consideration.

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1. (1917) 35 M. L. J. 405.

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In June, 1910, Nilakandhan Tirumumpu, karnavan of an illom, by Ex. II, renewed in favour of Defendant 1 an expired kanom on conditions which it has not been suggested were in any way improper or beyond his powers. The term of that kanom would expire in June, 1922, but in April, 1919, he granted by Ex. III another renewal on the same conditions except a very slight increase of rent. Nilakandhan Tirumumpu lived and continued to be karnavan of his illom until November or December, 1922; that is for 5 or 6 months after the expiry of the term of Ex. II, the kanom deed of 1910. In May, 1923, his successor as karnavan, Narayana Tirumumpu, Defendant 6, granted to the Plaintiff by Ex. A a melkanom, on which the Plaintiff has sued for redemption and recovery from Defendant 1. The question now for decision is whether Ex. III prevails over Ex. A. Both the Subordinate Judge and the District Munsif have found Ex. III "invalid" because, though its term and conditions are otherwise proper and such as a karnavan might fix within the scope of his powers, it was granted by Nilakandhan Tirumumpu long before the term of Ex. II had expired, both treating as of no relevancy or effect the facts that he lived and remained karnavan for several months after the term of Ex. II, and during those months might have granted to Defendant 1 a valid renewal on the same conditions as in Ex. III and that renewal no one could have disputed. The question raised is whether a kanom for a proper term and on proper conditions granted long before the expiry of a current term by a karnavan who remains in office after expiry of that term is of no effect. A similar question may be asked in respect of a lease, and the answer to the two questions will depend on the same considerations, and those considerations will apply whether the kanom or lease is granted to a new tenant, who is to be put in possession by the karnavan after the expiry of the current term, or as a renewal to the sitting tenant or by a melcharth directing a new tenant to recover from him.

As has been pointed out, there has been some conflict and confusion in the decisions, reported and unreported, on this question. If I may say so with great respect, the confusion appears to me to have been due to an occasional tendency to forget that, although the law of Malabar and South Kanara varies from the law in force in the rest of this Presidency in many important respects, outside the field of those variations

the general principles of law applicable elsewhere apply also in Malabar and South Kanara. If we remember that, I think the answer to the question before us will be simple and obvious.

A jenmi, who is the absolute owner of land and in law has no one but himself to consider in dealing with it, can validly grant a lease of it or a kanom over it for any term and on any conditions he likes and càn do so at any period before the expiry of a current term. But the karnavan of a jenmi illom or tarwad has limited powers. When land of his illom or tarwad is vacant or the term of a lease or kanom has expired, he can within the scope of his ordinary powers grant a lease or kanom for not more than the customary term and on conditions which are reasonable in the interests of his illom or tarwad; and such a lease or kanom no member of his illom or tarwad can dispute. But, if in such circumstances without tarwad necessity or benefit he grants a lease or kanom in excess of those powers, his act will not bind the members of his illom or tarwad against their will: they can avoid it. That however does not mean that it is void from its inception. Like an alienation made by the manager of an ordinary Hindu joint-family or by a Hindu father or by a guardian or by a limited owner in excess of his powers it is voidable at the option of the persons whose rights are infringed. But, as in those cases, if the members whose rights have been infringed by the karnavan exceeding his powers do not wish to exercise their option to avoid his act, then what he has done as karnavan in their names and as their representative stands good.

Now let us suppose that the lease or kanom granted is for not more than the customary term and its conditions are proper in the interests of the illom or tarwad but it is granted before the expiry of a current term. Sometimes it is suggested that to grant a lease or kanom a day or a week or a month before the expiry of a current term is beyond the karnavan's powers. That, as my brother Anantakrishna Aiyar has indicated, is absurd. A prudent karnavan, who wishes to do his duty in protecting the interests of his illom or tarwad, like any other businesslike landlord must look reasonably far ahead in such matters, and it may often be proper for him to grant a renewal or a melcharth or a lease or kanom to a new tenant a reasonable time before the expiry of a current term. If he waited until that term had actually expired, opportunity might have slipped

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by to the serious detriment of his illom or tarwad. To lay down that in such a matter a karnavan would exceed his powers, if he did what reasonable and prudent landlords do every day and what a manager of a joint-family or a trustee or a guardian would be rightly blamed for failing to do, would be wholly unreasonable. If it is urged that the words of some decisions go so far as that, we may be sure that the learned Judges did not intend their words to be interpreted literally in that way. If it is within the powers of a karnavan to grant a lease or kanom for a proper term and on proper conditions after the expiry of a previous term, it must also be within his power to grant a similar lease or kanom a reasonable time before the expiry of a current term; and the length of the time which is reasonable will vary with the circumstances of the case.

But is it within his power to grant such a lease or kanom unreasonably long before the expiry of a current term, earlier than a reasonable man who has others to consider besides himself would tie his hands? It has been decided in *Cheria Cherikandan* v. *Krishnan Nambiar*[1] and other cases that in the absence of necessity or benefit that is beyond his powers. The reason given in *Cheria Cherikandan* v. *Krishnan Nambiar*[1] is that he cannot be allowed in that way to fetter the discretion of the karnavan who may be in office when the current term expires. But that is only one aspect of the matter. A karnavan cannot, any more than another man, see far into the future and so cannot tell long beforehand what will be the proper conditions in the interests of his illom or tarwad for a lease or kanom to take effect on the expiry of a current term. But if a karnavan goes beyond his powers and without necessity or benefit grants a new lease or kanom, by renewal, melcharth or otherwise, long before the expiry of a current term, as in other cases in which professing to act on behalf of his illom or tarwad he makes a grant in excess of his powers, his act is not void but voidable. At whose option is it voidable? We have supposed that the lease or kanom, though granted prematurely and so beyond the powers of the grantor, is for a proper term and on conditions which, as events turn out, are proper at the expiry of the current term. Obviously the junior members of the

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1. (1914) 27 M. L. *J.* 690.

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illom or tarwad cannot avoid such a lease or kanom, as it is within the powers of their karnavan at the time it takes effect. It is the karnavan alone who has the option of avoiding it. If the karnavan who granted the lease or kanom prematurely is dead or no longer in office when the previous term expires, then it is his successor in office at that time who has the option of avoiding it. But, if the karnavan who granted the lease or kanom prematurely is still in office when the previous term expires, no one but he has the option to avoid his grant. If he chooses himself to disavow it, he will lay himself open to a suit by his lessee or kanomdar, with what possible result it is unnecessary now to consider. But, if he does not disavow it, his voidable grant, which no one else can avoid, stands good.

If we apply this simple and obvious result to the present case, it is clear that Defendant 1 must succeed. Nilakandhan Tirumumpu as karnavan granted to him a premature and voidable renewal in 1919. When the previous term expired and the voidable renewal was to take effect in 1922, as it is not suggested that its conditions were at that date in any way improper or unsuitable, Nilakandhan Tirumumpu, who was still in office as karnavan, was the only person who could avoid it. He did not do so; and therefore it stands good, and the Plaintiff's suit must fail.

I agree that in the circumstances each party should bear his own costs throughout.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Mazumdar Sobhanadri Rao Pantulu Garu and others .. *Petitioners.**

Sobhanadri Rao Pantulu, *In re.*

Court Fees Act (VII of 1870), S. 7 (iv) (c), (v) and (xi) (cc)—Inam land—Inamdar claiming both varams—Suit in ejectment—Defendants pleading occupancy right—Court-fee payable

The plaintiff, an inamdar, claimed that he was entitled to both varams in the inam land and though he had no proof of actually letting the defendants into possession, he claimed the right to eject them after due notice by virtue of his title to the kudivaram. The defendants did not dispute the plaintiff's right to melwaram but asserted occupancy right in the land.

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*C. R. Ps. Nos. 1195 to 1229 of 1931. 30th August, 1932.

Sobhanadri Rao Pantulu, *In re.*

Held, that court-fee was payable on the plaint under cl. (*iv*) (*c*) and not under cl. (*v*) or (*xi*) (*cc*) of S. 7 of the Court Fees Act.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Masulipatam, dated the 26th day of August, 1931 and made in O. S. Nos. 12 to 46 of 1930 (O. S. Nos. 191 to 195, 254 to 260, 268, 269, 288, 299, 385 to 388, 393 to 396 and 432 to 442 of 1928 on the file of the District Munsif's Court, Gudivada).

S. Varadachariar and *N. Rama Rao* for petitioners.

The Government Pleader (*P. Venkataramana Rao*) for the Government.

The Court made the following

Jackson, J.

ORDER. *Jackson, J.*—This is a question of Court-fees. The plaintiff, an inamdar, claims to have full right to both kudivaram and melwaram in the land which comprises the inam (paragraph 3), so the letting to tenants is for temporary periods (paragraph 4), and the inam is not an estate within the definition in Act I of 1908 (paragraph 5); all tenants are tenants at will (paragraph 6). In December, 1926, the defendants who are temporary tenants were given notice to quit (paragraph 7) and the plaintiff prays for a decree establishing his right in the suit lands and removing the defendants.

This plaint plainly sets forth a familiar form of suit. The inamdar claims both varams, and therefore though he has no proof of actually letting the defendants into possession, he claims the right to eject them after due notice, by virtue of his title to the kudivaram. The tenants do not dispute his claim to the melwaram, but assert occupancy right.

The Court-fee has been paid under S. 7, cl. (*xi*) (*cc*) of the Court Fees Act. The Lower Court has ordered that the fee shall be computed under S. 7 (*v*) and the plaintiff appeals.

Clause (*xi*) is applicable when the suit is based on a lease, but not when the plaintiff also wants a decree establishing his title, *Balasidhantam* v. *Perumal Chetti*[1]. So far the order of the Lower Court is unexceptionable. But the learned Subordinate Judge finds that the suits are for the declaration of plaintiff's title to the plaint schedule lands which is not quite correct. The defendants, though they do not put plaintiff's title as high as he would like, at least admit that he is the landholder of the

1. (1914) 27 M. L. J. 475.

Sobhanadri Rao Pantulu, *In re.*

Jackson, J.

land in question, and so far his title to the land is not in dispute. The only quarrel between them is whether he is entitled to the kudivaram, and that is not on the same footing as a dispute between alleged owner and trespasser. Cl. (*v*) (*c*) would apply to a case where the plaintiff is suing to be put into possession of an inam, and it can hardly have been contemplated that a plaintiff should pay the same court-fee when he sues for possession of an inam against a rival claimant, and when as undisputed inamdar he asserts his title to the kudivaram.

The appropriate section would therefore seem to be S. 7 (*iv*) (*c*) to obtain a declaratory decree (that he is entitled to the kudivaram) and consequential relief of possession.

The record will be returned to the Lower Court to value the suits accordingly.

B. V. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

K. N. Guruswami and others .. *Appellants* (Petitioner and L. Rs. of the 1st Petitioner)*

v.

Muhammad Khan Sahib .. *Respondent (3rd Defendant-Respondent).*

Guruswami *v.* Muhammad Khan Sahib.

Civil Procedure Code (V of 1908), S. 13—Foreign judgment against British subject—Recognition by British Court—Submission to jurisdiction of foreign Court—Proof—Carrying on business as partner in foreign country.

A British Indian Court will not recognise the judgment of a foreign Court passed in an action *in personam* against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court. The mere fact that the British subject has entered into a partnership in the foreign country and that the suit relates to a transaction entered into in the course of the business of the partnership will not lead to the inference that he has agreed to be bound by the decision of the foreign Court.

Gurdyal Singh v. *Raja of Faridkote*, (1894) L. R. 21 I. A. 171: I. L. R. 22 Cal. 222: 4 M.L.J. 267 (P.C.) and *Emanuel* v. *Symon*, (1908) 1 K.B. 302, relied on.

Appeal against the order of the District Court of Coimbatore, dated the 28th day of June, 1928 and made in E. P. R. No. 7 of 1927 in O. S. No. 6 of 1921-22 on the file of the District Court of Bangalore.

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* C. M. A. No. 536 of 1928. 9th August, 1932.

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B. Somayya for appellants.

B. Sitarama Rao for respondent.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—This appeal raises a question as to the effect of an *ex parte* judgment passed by a foreign Court against an absent foreigner. The facts may be briefly stated. The appellants are subjects of the Mysore State and they filed a suit in the District Court of Bangalore against three defendants, the last of whom is the respondent before us. The suit was based upon a promissory note alleged to have been executed by them and also upon a contract, which they were stated to have entered into. The 3rd defendant (the respondent) was a British subject and was residing at the time of the suit in the District of Coimbatore, where (the appellants allege, though this fact is denied) he was served with the summons in the suit. He, however, did not appear, but a judgment was passed by the Bangalore Court against him also. This foreign decree, the appellants sought to execute in the Lower Court, but the learned Judge refused their application under S. 13 of the Civil Procedure Code, holding that it was passed without jurisdiction. The appellants question in this appeal the correctness of the order made.

It is settled law, that the British Courts will not recognise the judgments of the Courts of a foreign country passed in an action *in personam* against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court.

But, Mr. Somayya, the appellants' learned counsel, asks us to assume certain facts and, for the purpose of this judgment, those facts may be assumed. Mr. Somayya's complaint is, that the Lower Court has not given him an opportunity of proving those facts; but, in the view we take, even assuming that the facts alleged are true, the learned counsel's contention cannot prevail.

The facts alleged by him are these: the three defendants were a firm of partners carrying on business within the State of Mysore, that the partnership was subsisting on the date of the action and that the suit related to certain dealings with that firm. On these facts, it is contended, that the 3rd defendant

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must be deemed to have submitted to the jurisdiction of the Bangalore Court.

The question to decide is, can the inference be drawn from the facts alleged, that the 3rd defendant agreed to submit to the jurisdiction of the foreign Court? In *Nalla Karuppa Settiar* v. *Mahomed Iburam Saheb*[1] a somewhat similar contention was raised. The argument there was twofold; that the defendant, by carrying on business through his partners at Kandy, should first be regarded as constructively resident there, and secondly, as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was being carried on. The second contention shows that the dealings to which the suit related were not with the defendant individually, but with the partnership of which he was a member. But a later case, to which I shall presently refer, puts it beyond doubt that this makes no difference. The contentions were overruled and it was held that the Court at Kandy had no jurisdiction over the defendant. The point now raised has been more fully considered by the Court of Appeal in England in *Emanuel* v. *Symon*[2]. There it was argued, that by the fact of entering into a partnership in a foreign country, the defendant bound himself to submit to the jurisdiction of the Courts of that country, in regard to matters arising in connection with that partnership. The Court negatived that argument and explained the case of *Copin* v. *Adamson*[3]. Lord Alverstone, C. J., thus observes:

> "The judgment in that case went in favour of the plaintiff because the defendant had expressly agreed to submit to the jurisdiction of the foreign Court. And in the Court of Appeal the judgment of Lord Cairns proceeded on that footing, and he refrained from deciding the question whether the mere fact of becoming a shareholder in a French company conferred jurisdiction upon the Courts of France."

Kennedy, L.J., points out that the effect of the decision of the Judicial Committee in *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote*[4] is, that the mere fact that a person enters into a contract in a foreign country, does not lead to the inference that he agrees to be bound by the decisions of the Courts of that country. Having said so, he goes on to say that, in this respect, there is no distinction between entering into an ordinary contract and contract of partnership.

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1. (1896) I. L. R. 20 Mad. 112: 7 M. L. J. 76.
2. (1908) 1 K. B. 302.
3. (1874) L. R. 9 Exch. 345.
4. (1894) A. C. 670.

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"It is contended," says Kennedy, L. J., "that there may be some difference between a contract to be fulfilled for the immediate benefit of the promisee, *e.g.*, a contract for the sale of goods, and the contract contained in articles of partnership; but I can see no true line of distinction between the two cases." In the opinion of Kennedy, L. J., also, *Copin* v. *Adamson*[1] is not an authority for the proposition that a person, by the mere fact of becoming a shareholder in a foreign company, agrees to be bound by the decision of the foreign Court.

These authorities very clearly show that the appellants' contention cannot prevail and this appeal must be dismissed with costs.

Reilly, J.

Reilly, J.—I agree. In my opinion the matter is concluded by *Gurdyal Singh* v. *Raja of Faridkote*[2] and *Nalla Karuppa Settiar* v. *Mahomed Iburam Saheb*[3].

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Paluri Venkatasiva Rao .. *Petitioner** (*Plff.*)

v.

Bodapati Venkatanarasimha Satyanarayanamurthy and others .. *Respondents* (*Defts.*).

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Court Fees Act (VII of 1870 as amended by Madras Act V of 1922), S. 7 (iv-A), (iv) (c) and (v)—Setting aside decree—Ex-minor—Suit for declaration that prior decree is void and for recovery of property—Whether amounts to suit for cancellation of decree—Prayer for possession as main relief—Court-fee payable.

The plaintiff, an ex-minor, sued for a declaration that a decree obtained against him was void, for setting aside that decree if necessary, and for recovery of possession of the property covered by the decree. The plaint alleged that the previous suit was instituted by defendant 1 while the plaintiff was a minor, that in that suit he was not properly represented by his guardian and that the decree had been obtained by fraud and collusion.

Held, that the suit was in substance one for setting aside or cancellation of the previous decree and that court-fee was payable under S. 7 (*iv*-A) of the Court Fees Act as amended in Madras and not under S. 7 (*iv*) (*c*) of the Act.

Balakrishna Nair v. *Vishnu Nambudri*, 1930 M. W. N. 509, considered.

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*C. R. P. No. 1955 of 1931. 21st March, 1932.

1. (1874) L. R. 9 Exch. 345.
2. (1894) L. R. 21 I. A. 171: I. L. R. 22 Cal. 222: 4 M. L. J. 267 (P.C.).
3. (1896) I. L. R. 20 Mad. 112 : 7 M. L. J. 76.

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Held, further, that the main relief in the suit being recovery of possession of the property, the suit also came under S. 7 (*v*) of the Act and that court-fee was consequently payable either under S. 7 (*iv*-A) or S. 7 (*v*).

Rajagopala v. *Vijayaraghavalu*, (1914) I. L. R. 38 Mad. 1184, relied on.

A suit to set aside a decree is a well-known form of action both in the Indian and the English Law.

Per *Anantakrishna Aiyar, J.*—In cases falling under S. 7 (*iv*-A) it is not the market value but the statutory value that has to be adopted.

Venkatanarasimha Raju v. *Chandrayya*, (1926) 53 M. L. J. 267, relied on.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Narsapur, dated 18th November, 1931 and made in O. S. No. 11 of 1930.

P. Somasundaram for petitioner.

V. Suryanarayana for respondents.

K. Subba Rao for the *Government Pleader* (*P. Venkataramana Rao*) on behalf of the Crown.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J*:—This Civil Revision Petition comes before us on the question what is the proper court-fee to be paid on the plaint in the suit concerned. In the plaint the prayers are for a declaration that the decree obtained by Defendant 1 in O. S. No. 302 of 1916 on the file of the Additional District Munsif of Bhimavaram is void, for setting aside that decree, if necessary, and for recovery of the property, covered by the decree. The Plaintiff valued the suit for court-fee as if it came under cl. (*c*) of S. 7 (*iv*) of the Court Fees Act. The Defendants objected and said that in its nature this was a suit for the cancellation of the previous decree and that therefore the Plaintiff should pay court-fee under S. 7 (*iv*-A) of the Act, *i. e.*, under the new sub-section introduced into the Act for this Presidency in 1922. The Subordinate Judge after hearing arguments on the question came to the conclusion that the suit was really one for possession of the property and therefore that it came under S. 7 (*v*) of the Act and ordered court-fee to be paid accordingly. It happens that the same court-fee is due whether the suit comes under S. 7 (*v*) as one for possession or under S. 7 (*iv*-A) as one for cancellation of the previous decree.

The plaint alleges that the previous suit, O. S. No. 302 of 1916, was brought by Defendant 1, while the Plaintiff was a minor, for the recovery of some property, which the Plaintiff

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had inherited through his adoptive father, and that in that suit he was not properly represented because the guardian appointed for him, his adoptive mother, had an interest adverse to his in the suit and moreover she colluded with the present Defendant 1 in that suit and enabled him by suppression of facts fraudulently to obtain a decree. Now I do not think it can be seriously disputed, and in the end it has not been disputed before us, that, if this suit is properly described as a suit for setting aside the previous decree, then it is a suit for cancellation of that decree as the word "cancellation" is used in the new S. 7 (*iv*-A) of the Court Fees Act. That sub-section speaks of the cancellation of a decree or other document, which appears to mean the same thing as setting aside a decree or other document. It may be noticed that in Art. 91 of the Limitation Act "to set aside" and "to cancel" a document are used as synonymous terms. But what is contended for the Plaintiff here is that his suit is not a suit for setting aside the previous decree, but that it is a suit for a declaration with consequential relief and therefore he can avoid the additional charge which would fall upon him if his suit were a suit for cancellation of a previous decree for the recovery of property under S. 7 (*iv*-A) of the Act. Mr. Somasundaram for the Plaintiff relies upon the decision of Ramesam, J., in *Balakrishna Nair* v. *Vishnu Nambudri*[1]. There the learned Judge said that

"in the case of decrees the proper prayer is not to set the decrees aside but for a declaration that the decrees are not binding on the plaintiffs;"

and he added that therefore the suit before him was one for a declaration and consequential relief, and he allowed it to be valued for court-fee under S. 7 (*iv*) (*c*). On the facts of that case, as the learned Judge understood them, it appears that some minor Plaintiffs were suing for a declaration that a decree obtained against their karnavan and against other minor members of their family was not binding on them and for recovery of property sold in execution of that decree. If that was the nature of the suit, then I do not think it can be disputed that the learned Judge was right in saying that the Plaintiffs there had to pray for no more than a declaration that the previous decree was not binding on them and the consequential relief of recovery and that it was not appropriate for them to ask that that decree, to which they had not been parties, should be set

1. 1930 M. W. N. 509.

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aside. .But undoubtedly the learned Judge's remarks, which I have quoted, are much wider than that, and they imply that in his opinion in this country a Plaintiff who wishes to impeach a previous decree, to which he has been a party, as not binding on him should pray, not that the decree be set aside, but for a declaration that it is not binding on him. In one sense it may be that it is more appropriate for a Plaintiff, who wishes to impeach a decree obtained against him in a previous suit as having been obtained by fraud, to ask for a declaration that that decree is not binding on him than that he should ask that the decree itself should be set aside. There may even seem to be some impropriety in going to an inferior Court, as in some such cases he must, and praying that that inferior Court should set aside the decree of a superior Court. I myself have been inclined to think that, as Ramesam, J., appears to have thought, it is more appropriate in such cases to word the prayer as one for a declaration that the previous decree is not binding on the Plaintiff. But is that more than a question of mere propriety and seemliness? In such a second suit, if the Plaintiff succeeds, is not the effect and essence of what he obtains exactly the same, whether it is called setting aside the previous decree or declaring that the previous decree is not binding on him? In either case the result of the second decree is that the first decree is no longer binding on him: it is no longer of any avail against him: so far as he is concerned, it is wiped out. If that is so, is it in any way incorrect to speak of setting aside the previous decree, whether that setting aside is done by a Court superior to that which made the first decree or co-ordinate or inferior? In this country the expression "to set aside a decree" as a description of a suit has been used in the Limitation Acts since 1859. That expression is well known as the description of such suits in England. In *Flower* v. *Lloyd*[1] two of the Lords Justices explicitly point out that, if a decree or a judgment is to be impeached for fraud, the proper way to do it is by an action for setting aside the decree or judgment. That I think it must be admitted is recognised as the ordinary and proper description of such a suit in England. In this country their Lordships of the Privy Council have spoken of a suit to get rid of a previous decree obtained against the Plaintiff by fraud as a suit to set aside the previous decree in

1. (1877) 6 Ch. D. 297.

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Radha Raman Shaha v. *Pran Nath Roy*[1] and *Khagendra Nath Mahata* v. *Pran Nath Roy*[2] and we find the expression "setting aside a decree" obtained by fraud as early as the judgment of Sir Barnes Peacock in 1866 in *Nilmoney* v. *Puddo Lochun*[3]. It may be noticed that, even when a suit is brought to set aside a previous decree and is so described by the Plaintiff, if he succeeds, the relief which he obtains is not necessarily a decree in so many words setting aside the previous decree. As Srinivasa Aiyangar, J., pointed out in *Arunachellam* v. *Sabapathy*[4] various reliefs may be given in such a suit appropriate to the circumstances of the case. In *Manohar Lal* v. *Jadunath Singh*[5] their Lordships of the Privy Council decided that in such a suit, when the result was that the previous decree was found not good against one of the parties to it but it was not necessary or proper to disturb it as against the other parties to it, the proper decree to make was that the previous decree was not binding on the particular Plaintiff concerned, not that the previous decree should be set aside altogether. But, whether the prayer is that the previous decree should be set aside or that it should be declared not binding on the Plaintiff in the second suit, and whether the result of the second suit is that the whole decree is set aside or it is more appropriate in the particular circumstances to make a declaration merely that the previous decree is not binding upon the Plaintiff in the second suit, the nature of the suit is really the same. The suit is to get rid of the effect of the first decree, so far as the Plaintiff in the second suit is concerned, and you cannot alter the nature of the suit or its eventual effect by wording the plaint as one for a declaration that the previous decree is not binding on the Plaintiff in the second suit or by praying that the previous decree be set aside.

Now, before the amendment of the Court Fees Act so far as this Presidency is concerned by the introduction of the new sub-sec. 7 (*iv*-A), it cannot be denied that, even if such a suit as we are discussing had been described by the Plaintiff as one for setting aside a previous decree, for court-fee purposes it would have had to be treated as a suit for a declaratory decree. There was nowhere else in the Court Fees Act for such a suit

1. (1901) I. L. R. 28 Cal. 475 (P. C.).
2. (1902) L. R. 29 I. A. 99: I. L. R. 29 Cal. 395 (P.C.).
3. (1866) 5 W. R. 20.
4. (1917) I. L. R. 41 Mad. 213: 33 M. L. J. 499.
5. (1906) L. R. 33 I. A. 128: I. L. R. 28 All. 585: 16 M. L. J. 291 (P. C.).

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to come in. If consequential relief was prayed for, then it came under S. 7 (*iv*) (*c*); if consequential relief was not prayed for, then it came under Art. 17 of Sch. II. There was no separate provision in the Court Fees Act for a suit to set aside or cancel a previous decree. But now the Legislature has introduced the new sub-sec. 7 (*iv*-A). That covers certain suits for cancellation of decrees and, as I think we must interpret it, certain suits for setting aside decrees, however described. It covers suits for cancellation of decrees for money or other property having a money value. Thus suits for cancellation of, or setting aside, such previous decrees, which before would have had to come in as suits for declaratory decrees, now have their special place in the Act. The result is that for suits for cancellation of, or setting aside, decrees which have been made for the recovery of money or for the recovery of property having money value you have to pay court-fee under the new sub-section. If they come within that description, they are cut out of the general class in which they previously came—suits for declaratory decrees—and have their special place. We are only concerned in this case with the question of court-fee. Whether verbally it is more strictly appropriate to call such suits suits for declarations that the previous decrees are not binding on the Plaintiffs is purely academic so far as court-fees are concerned. The intention of the Legislature appears to be that a suit in which the Plaintiff prays for a decree that a previous decree obtained against him is of no effect against him on account of fraud in obtaining it and that, so far as he is concerned, that decree is wiped out, however he may choose to word his prayer, comes within the new S. 7 (*iv*-A), if the previous decree was one for recovery of money or property having a money value. That appears to me to cover the present case.

But it has been pointed out to us by Mr. Suryanarayana for Defendant 1 and also on behalf of the Government Pleader that in this case the Plaintiff has prayed for recovery of possession and, that being so, quite apart from all other discussion, his suit comes under S. 7 (*v*), as the Subordinate Judge has found. In *Chinnammal* v. *Madarsa Rowther*[1] it was said by Boddam and Bhashyam Aiyangar, JJ., that, if in a suit for a declaration and consequential relief the relief prayed for came within other provisions of the Court Fees Act than S. 7 (*iv*)

1. (1903) I. L. R. 27 Mad. 480: 14 M. L. J. 343.

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(*c*), for instance within S. 7 (*v*), then the mode of valuing the relief was regulated by the Legislature itself in those provisions. As Mr. Somasundaram has urged, that remark was made *obiter*. But in *Rajagopala* v. *Vijayaraghavalu*[1] we have a case very similar to the present one. There the Plaintiffs sued for a declaration that a certain decree had no legal effect against them and for possession of some property which had been sold in execution of that decree. Oldfield and Tyabji, JJ., pointed out that the District Judge in that case was clearly mistaken in his statement that S. 7 (*iv*) (*c*) regulated the valuation of the whole suit, since part of the relief claimed related to possession, which had to be dealt with in accordance with S. 7 (*v*) notwithstanding that a declaration also was asked for, and they referred to *Chinnammal* v. *Madarsa Rowther*[2] as an authority for that view. Then in *Arunachalam Chetty* v. *Rangaswami Pillai*[3] the question of the court-fee to be paid on a declaratory suit came before a Full Bench, and the very first sentence of the opinion of the Full Bench is

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within clause (*iv*), sub-clause (*c*) of S. 7 of the Court Fees Act, but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly."

That is a very important statement set out at the very opening of the opinion of the Full Bench. Mr. Somasundaram very properly admits that, if a suit is really and in essence a suit for possession, the Plaintiff cannot avoid paying court-fee as for possession merely by praying for some unnecessary or entirely incidental declaration in his plaint. But he contends that the principle set out by the Full Bench, which I have quoted, is not now applicable. Apart from the authority of the Full Bench in that case, which I have quoted, it seems to me clear that in such an Act as the Court Fees Act, if there is a special provision which applies to a particular case, then that special provision must be applied by us rather than some general classification, in which the suit may also be included, which may be more favourable to the Plaintiff. But Mr. Somasundaram has suggested that another amendment to the Court Fees Act has been made for this Presidency, which affects the

1. (1914) I. L. R. 38 M. 1184.
2. (1903) I. L. R. 27 Mad. 480: 14 M. L. J. 343.
3. (1914) I. L. R. 38 Mad. 922: 28 M. L. J. 118 (F. B.).

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question, *i. e.*, the proviso introduced in 1922 towards the end of S. 7 (*iv*), which runs:

"Provided that in suits coming under sub-clause (*c*) in cases where the relief sought is with reference to any immoveable property, such valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (*v*) of this section."

Now a suit for possession is undoubtedly a suit with reference to immoveable property; but what the new proviso says is, not that all suits with reference to immoveable property shall be charged in the way set out in it, but that suits in which relief is sought with reference to immoveable property shall be valued at not less than half the value of the immoveable property calculated in the way set out. That does not appear to me to lay down that, if the relief sought properly falls within any other provision requiring a higher valuation or charge, that higher charge is not to be made. The proviso merely introduces a downward limit, below which reliefs sought in respect of immoveable property consequential on declaratory decrees shall not be valued. In my opinion therefore, as the Plaintiff in this case sues for the recovery of the property concerned and that cannot be regarded as a mere incident to this plaint but is the main relief, the Subordinate Judge was right in saying that the suit came within S. 7 (*v*) of the Court Fees Act. So far as I can see, the suit falls within both S. 7 (*v*) and S. 7 (*iv*-A). As the valuation and the court-fee charged are the same under either of those sub-sections, that has no effect upon the court-fee to be paid by the Plaintiff.

In my opinion the scale of valuation adopted by the learned Subordinate Judge is right, and this petition should be dismissed with costs—one set—to be divided between Defendant 1 and the Government Pleader. For payment of the additional court-fee 5 weeks from this date may be allowed.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree. I referred this Civil Revision Petition for the decision of a Bench having regard to the observations of Ramesam, J., in *Balakrishna Nair* v. *Vishnu Nambudri*[1].

The Plaintiff instituted O. S. No. 11 of 1930 on the file of the Sub-Court of Narsapur for a declaration that a decree obtained against him, while he was a minor represented by his mother as guardian, by the present 1st Defendant in O. S.

1. 1930 M. W. N. 509.

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No. 302 of 1916 on the file of the Additional District Munsif of Bhimavaram, was not valid and binding upon him and for recovery of possession of the properties covered by that decree. The 1st Defendant, who is the only contesting Defendant in the suit (the other Defendants being, it is said, tenants under the Plaintiff at the time of the prior suit O. S. No. 302 of 1916) raised an objection as regards the amount of court-fee payable on the plaint in the present case. The Plaintiff's contention was that the suit was one for a declaratory decree, that it came under S. 7, clause (*iv*) (*c*) of the Court Fees Act and that he was not bound to value the relief at anything more than one-half of the value of the properties covered by the plaint. On the side of the 1st Defendant it was contended that the suit must be taken to be substantially a suit to set aside a former decree and that the court-fee payable on such a plaint is that provided for by S. 7 (*iv*-A) of the Court Fees Act. The learned Subordinate Judge held that the suit should be treated as one for possession of the properties and should be valued under S. 7 (*v*) of the Court Fees Act, and accordingly directed the Plaintiff to pay the deficient court-fee on that basis. The Plaintiff has presented this Civil Revision Petition against the order passed by the Subordinate Judge.

The first question that arises for consideration in this case is whether the suit is one for a declaration, or whether it is a suit for cancellation of a decree. Prior to the enactment of the Madras Court Fees Act (V of 1922) a suit for setting aside or cancelling a decree was held to come under S. 7 (*iv*) (*c*) for purposes of court-fee. In 1922 the Legislature added a new clause—S. 7 (*iv*-A)—which enacts that "in a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value," the valuation should be according " to the value of the subject-matter of the suit, and such value shall be, if the whole decree is sought to be cancelled, the amount or value of the property for which the decree was passed, and if a portion of the decree is sought to be cancelled, such part of the amount or value of the property". It should be noticed that the words used in the new clause are "in a suit for cancellation of a decree for money or other property." I may clear the ground by stating that the learned advocate for the petitioner—Mr. Somasundaram—did not contend before us that there was

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any difference between "cancellation of a decree" and "setting aside a decree," and I think the learned advocate was right. But his main contention was that in such a suit the relief in substance is a declaration that the prior decree is not binding upon the Plaintiff; and he argued that the plaint in such a suit should be treated as one asking for a declaratory decree and coming under S. 7 (*iv*) (*c*). He also relied on the observations of Ramesam, J., in *Balakrishna Nair* v. *Vishnu Nambudri*[1]. In that case the learned Judge observed at p. 510 as follows:—

> "Here all that is sought to be got over are decrees and in the case of decrees the proper prayer is not to set aside decrees but one for a declaration that the decrees are not binding on the plaintiffs. The suit is therefore for a declaration and consequential relief."

It was argued by the learned advocate for the Petitioner that that judgment is authority for the proposition that a plaint, whose substantial object is that the decree in the prior suit should be held to be not binding upon the Plaintiff any longer, should be taken to be only a suit for a declaratory decree, and that there is really no such thing as a suit to cancel or set aside a decree; and the learned advocate strongly relied upon the observations of Ramesam, J., in the case cited. The basis for that argument is that the law knows of no such thing as a suit to set aside a decree; but such a contention is, in my opinion, entirely unsustainable. It has been held in England from very early times, and also in India, that a suit to set aside a decree or judgment is a well-known form of action. See the question discussed with reference to the law in England in Story's Equity Pleadings, paragraphs 421, 426 and 428. The question is also discussed in Seton on Decrees, Vol. I, p. 189, Daniel's Chancery Practice, Vol. II, p. 1332 and 13 Hals., p. 352, paragraph 490. See also *Flower* v. *Lloyd*[2]. It is there stated that in cases where it is alleged that a previous decree was obtained by fraud as against the present Plaintiff the suit is one to set aside the prior decree and judgment. The same language has been used in decisions in India also. The decision in *Abdul Huq Chowdhury* v. *Abdul Hafez*[3] traces such practice in India to 1866, *Nilmoney* v. *Puddo Lochun*[4], where a judgment of Sir Barnes Peacock is reported. See also *Krishna-*

1. 1930 M. W. N. 509.
2. (1877) 6 Ch. Dn. 297.
2. (1910) 11 C.L.J. 636.
4. (1866) 5 W. R. 20.

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bhupati v. *Ramamurti*[1] and *Arunachellam* v. *Sabapathy*[2]. In fact the Privy Council decisions in *Radha Raman Shaha* v. *Pran Nath Roy*[3] and *Khagendra Nath Mahata* v. *Pran Nath Roy*[4] make the matter absolutely clear so far as the Indian Courts are concerned. In *Jalandhar Thakur* v. *Jharula Das*[5] the Privy Council refer to a suit "brought to set aside a decree". A suit to set aside a decree being then a form of action well known to both the English law and the Indian law, it cannot be said that the Legislature in enacting S. 7 (*iv*-A) of the Court Fees Act in 1922 provided for court-fee payable in respect of a class of suits not known to law.

Then it was argued that in substance such a suit must be treated for court-fee purposes as a suit for a declaratory decree, and Ramesam, J.'s decision above referred to was pressed upon us. Reading the judgment of the learned Judge, I understand the learned Judge to have made this observation with reference to a suit where the relief prayed for was that a decree obtained in a prior suit was not binding upon the Plaintiffs. In the words of the learned Judge, "the suit was brought by certain minor members of a Malabar tarwad for a declaration that a certain decree against the karnavan and other minor members represented by the karnavan as the guardian was not binding upon them". Reading the judgment of the learned Judge, I understand that the Plaintiffs in the subsequent suit were not parties to the prior decree. The use of the word "other" by the learned Judge is rather significant. If the present Plaintiff was not a party to the prior suit and decree, then it could not, in my opinion, be contended that the second suit filed by him should be one to set aside or cancel the prior decree. In the case of a document executed by a person, if he wants any relief with reference to it on the ground of fraud, he must have the document cancelled or set aside before he can claim such relief, being himself a party to the same; but a person who is not party to any such document is not bound to have it set aside or cancelled. In fact not being a party to the document, he cannot have it "set aside". All that he can pray for is a declaration that he is not affected in any way by that

1. (1892) I. L. R. 16 Mad. 198.
2. (1917) I.L.R. 41 Mad. 213: 33 M. L. J. 499.
3. (1901) I. L. R. 28 Cal. 475 (P. C.).
4. (1902) L. R. 29 I. A. 99: I. L. R. 29 Cal. 395 (P. C.).
5. (1914) L.R. 41 I.A. 267: I.L.R. 42 Cal. 244 at 249: 27 M. L. J. 100 (P.C.).

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document. Similarly in the case of a decree, a decree will have full force and binding effect between the parties to the same until it is set aside by the persons who were parties to the same; but persons who were not parties to the decree can only sue for a declaration in respect of their rights in relation to the decree. In this view, so far as the present case is concerned, the decision of the learned Judge in *Balakrishna Nair* v. *Vishnu Nambudri*[1] does not, in my opinion, support the contention of the present petitioner.

Prior to the enactment of Act V of 1922 a suit to set aside a decree was held to come under S. 7 (*iv*) (*c*) of the Court Fees Act. The Legislature subsequently enacted S. 7 (*iv*-A) which specifically provides for suits for cancellation of decrees for money or property having a money value. *Prima facie*, after 1922 a suit to cancel a decree (which is the same as a suit to set aside a decree) would no longer be governed by S. 7 (*iv*) (*c*). Otherwise no meaning can be attached to the new provision contained in S. 7 (*iv*-A). The learned advocate for the Petitioner argued that the form of relief that would be awarded to a Plaintiff in such cases would be by way of a declaration, and in support of that argument he drew our attention to the decision of the Privy Council in *Manohar Lal* v. *Jadunath Singh*[2]. In my view that is not the proper way of looking into the question. Whenever a party to a prior decree wants relief to the effect that he is no longer bound by the prior decree he should ask for the setting aside of the prior decree. What further and other connected appropriate reliefs would be granted by Court in such cases as the result of the setting aside of the prior decree would depend upon the circumstances of each case. In a case where others also were parties to the prior decree and they in no way claimed rights under the present Plaintiff, then, *prima facie*, the prior decree would be declared to be not binding so far as the present Plaintiff is concerned if the Court found that the prior decree was vitiated by fraud and accordingly proposed to give the Plaintiff the appropriate relief in the circumstances. In other cases, injunction might be properly granted to the Plaintiff as a result of setting aside the prior decree. The question relating to further reliefs to be granted in a suit which is substantially one to set aside the

1. 1930 M. W. N. 509
2. (1906) L. R. 33 I. A. 128 : I. L. R. 28 All. 585 : 16 M. L. J. 291 (P. C.).

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decree, has been considered by K. Srinivasa Aiyangar, J., in *Arunachellam* v. *Sabapathy*,[1] and also by Mookerjee, J., in the decision in *Abdul Huq Chowdhury* v. *Abdul Hafez*[2]. But that does not in any way alter the real nature of the plaint in the subsequent suit. I am not therefore inclined to agree with the learned advocate's contention that the present suit should be treated only as a suit for a declaratory decree and as coming under S. 7 (*iv*) (*c*).

Then it was argued that the Lower Court was not right in having directed the Plaintiff to pay court-fee calculated in accordance with the provisions of S. 7 (*v*). There are two answers to this contention. In the first place so far as the case before us is concerned, it does not really matter whether the case comes under S. 7 (*iv*-A) or S. 7 (*v*). The valuation would be the same in either case and the amount of court-fee payable also would be the same. Even where the suit was one for a declaratory decree and also for possession, it has been held by this Court that suits for possession having been specifically provided for by S. 7 (*v*), the suit has to be valued accordingly and court-fee paid under the provisions of that sub-section. This question has been discussed in *Chinnammal* v. *Madarsa Rowther*[3] and *Rajagopala* v. *Vijayaraghavalu*[4] and is practically concluded by the first paragraph of the opinion given by the Full Bench in *Arunachalam Chetty* v. *Rangaswami Pillai*[5]. But the learned advocate also argued that there was an amendment made in 1922, by which a proviso was added to S. 7 (*iv*) to the following effect:

> "Provided that in suits coming under sub-clause (*c*) where the relief sought is with reference to any immoveable property such valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (*v*) of this section;"

and he suggested that as the present is a case where relief with reference to immoveable property is asked for, the Plaintiff is entitled to value the relief in accordance with that proviso. I have already held that this case does not come under S. 7 (*iv*) (*c*). S. 7 (*iv*-A) is quite different from S. 7 (*iv*) either (*a*), (*b*) or (*c*), and the proviso has been added only to S. 7 (*iv*). S. 7 (*iv*-A) is a quite different provision of law, and the

1. (1917) I. L. R. 41 Mad. 213 at 218: 33 M. L. J. 499.
2. (1910) 11 C. L. J. 636 at 638.
3. (1903) I. L. R. 27 Mad. 480: 14 M. L. J. 343.
4. (1914) I. L. R. 38 Mad. 1184.
5. (1914) I. L. R. 38 Mad. 922: 28 M. L. J. 118 (F. B.).

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proviso does not operate with reference to S. 7 (*iv*-A). That is one answer to the contention of the learned advocate. The second answer is, that S. 7 (*iv*-A) enacts that a suit in such cases should be valued when the whole decree is sought to be cancelled according to the amount or value of the property for which the decree was passed. The section does not describe the mode in which that value is to be calculated. But that would only bring in a doubt as to whether the value should be the market value or the statutory value fixed by the Court Fees Act. In *Venkatanarasimha Raju* v. *Chandrayya*[1] Krishnan and Odgers, JJ., held that in such cases it is not the market value but the statutory value that has to be adopted where statutory value has been fixed by the Act. Adopting that value so far as this case is concerned, the Plaintiff is not in any way a gainer.

Lastly, it was argued that the construction that I am disposed to adopt would lead to hardship. I am not able to see exactly how. In a suit to set aside a decree and to recover possession of property, so far as possession of the property is concerned, the plaint has to be valued at 10 or 15 times the revenue, as provided for by S. 7 (*v*). That would in many cases be very much less than the amount or the market value of the property comprised in the decree, and I am not able to see how exactly the Plaintiff would ordinarily be put to greater difficulty or pecuniary loss by reason of the view I am inclined to take. But whatever it is, the point is reasonably clear to my mind; we have got to give effect to the new provision of law—S. 7 (*iv*-A.)—enacted in 1922; and unless we are able to say that the law knows of no such thing as a suit to cancel or set aside a decree, we have got to give effect to that provision of law. Suits to set aside decrees have been known to the Indian Limitation Act from 1859 to 1908. (*See* Art. 92 of the present Limitation Act and the corresponding provisions in the earlier Acts.) For the reasons I have given, the suit before us should be taken to be one to cancel or set aside a decree and as such would come under S. 7 (*iv*-A) of the Court Fees Act, and the Lower Court was right in this case in directing the Plaintiff to pay the deficient court-fee fixed by it, and that is the correct

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1. (1926) 53 M. L. J. 267.

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court-fee payable—whether the present case comes under S. 7 (*v*) or 7 (*iv*-A) of the Court Fees Act.

I agree that this Civil Revision Petition should be dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Chella Rangappa .. *Appellant** (*Petitioner*)

v.

Yerravenkatagiri Rangappa and others .. *Respondents.*

Rangappa v. Rangappa.

Provincial Insolvency Act (V of 1920), Ss. 4 and 54—Petition by Official Receiver to set aside execution sale—Dismissal under Ss. 51 *and* 54—*Subsequent petition by creditor under S.* 4—*Maintainability*—Res judicata—*Applicability to proceedings in insolvency.*

The doctrine of *res judicata* is applicable to proceedings in insolvency.

The Official Receiver filed a petition under Ss. 4 and 54 of the Provincial Insolvency Act to set aside an execution sale as "fraudulent and preferred". The Court held that there was no fraudulent preference and that S. 4 did not apply, and dismissed the petition under Ss. 51 and 54. A creditor then applied under S. 4 for the same relief.

Held, the application was not maintainable.

Appeal against the order of the District Court of Anantapur, dated 7th March, 1929 and made in O. P. No. 19 of 1928.

T. R. Ramachandra Aiyar, R. Srinivasa Aiyangar and *G. Musalappa Reddi* for appellant.

B. Somayya, S. Ranganadha Aiyar and *T. R. Arunachalam* for respondents.

The Court delivered the following

JUDGMENT.—In this O. P. No. 19 of 1928 the petitioner, a creditor of the estate of the 2nd respondent (insolvent), seeks to set aside a sale to the 1st respondent of certain properties. The 3rd respondent is the Official Receiver of Anantapur. The petition is stated to be under S. 4 of the Provincial Insolvency Act and paragraph 4 alleges that the sale was "in fraud of other creditors". This same sale was the subject of O. P. No. 13 of 1924 filed by the Official Receiver, now the 3rd respondent. That petition was stated to be under Ss. 4, 54 and 56, Provincial Insolvency Act and prayed that "the

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* C. M. A. No. 480 of 1929. 16th September, 1932.

execution sale in favour of the 1st counter-petitioner (now the 1st respondent) be set aside as fraudulent and preferred".

The third issue in that O. P. was "whether the sale amounts to a fraudulent preference . . ." and the fourth issue "whether in any event the sale can be set aside under S. 4, Insolvency Act".

The learned Subordinate Judge held that on the facts there was no fraudulent preference and that the provisions of S. 4 could not be invoked. It was of course obvious that S. 56 did not apply. The matter came before the High Court in C.M.S.A. No. 115 of 1927 on a question as to whether a second appeal lay from the District Judge and Ramesam and Devadoss, JJ., gave judgment as follows (Ex. A):—

"We think that the order of the Subordinate Judge was passed under Ss. 51 and 54, Provincial Insolvency Act. He especially refuses to apply S. 4 of the Act. The order is therefore not an order under S. 4 . . ."

Mr. T. R. Ramachandra Aiyar now argues that the appellant (petitioner) is free to proceed with his present petition as (1) it is *res judicata*, that there has been no decision under S. 4 which is the basis of this petition, and (2) that the respondent cannot plead *res judicata* to the decision under S. 54 as S. 11 of the Code of Civil Procedure does not refer to insolvency proceedings which are not "suits". We agree with his contention as to (1) as Ex. A is clear and in insolvency proceedings the Official Receiver represents the general body creditors of whom the present appellant is one.

As to the second point it is true that no authority has been cited before us to the effect that insolvency proceedings can be the subject of *res judicata* but there is ample authority for the position that S. 11, Civil Procedure Code, is not exhaustive and that as stated by the Privy Council in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1], "the binding force of such a judgment (*i.e.*, a previous judgment) depends not upon S. 13 of Act X of 1877, but upon general principles of law". The section referred to corresponds to S. 11, Civil Procedure Code. "If," say their Lordships, "it were not binding there would be no end to litigation". This is manifestly so and is especially applicable to insolvency proceedings. Were it otherwise it would be impossible for any one, whose possession of property received from an insolvent had been unsuccessfully impeached

1. (1883) L. R. 11 I. A. 37 at 41: I. L. R. 6 A. 269 (P. C.).

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as a fraudulent transfer or preference, to be able to sell that property or even to enjoy its proceeds with any sense of security. This is a position which is clearly opposed to the principle '*Nemo bis vexari debet*'. The above case *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1] was decided in 1883. Since then the Privy Council have reaffirmed their statement of the law bearing on the point in *Hook* v. *Administrator-General of Bengal*[2] and *Ramachandra Rao* v. *Ramachandra Rao*,[3] the latter a case under the Land Acquisition Act.

On the authorities above cited we are of opinion that the doctrine of *res judicata* is applicable to proceedings in insolvency and that the present petition is therefore unsustainable. We therefore agree with the learned District Judge and dismiss this appeal with customary costs throughout including pleader's fees. This disposes of the memorandum of objections.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

M. Chengayya Pantulu, Commissioner, representing the Board of Commissioners for Hindu Religious Endowments, Madras .. *Petitioner**

v.

Medarametla Kotayya and others .. *Respondents.*

Chengayya Pantulu v. Kotayya.

Madras Religious Endowments Act I of 1925, Ss. 53 (4) and 71, Act II of 1927, Ss 7 (2), 57 (4), 75 (4)—Civil Procedure Code, S. 92—Schemes for temples settled by Civil Court under S 92 of the Civil Procedure Code—Application to Board to modify them—Application whether could lie in respect of schemes settled by Court before the Act—Whether such application could be continued after the passing of the Act II of 1927—Retrospective effect of S. 75 (4) if any—Whether applications should be converted into suits.

Where applications were severally made to the Religious Endowments Board for modification of schemes which had been settled in respect of certain temples by the Civil Courts and were made on the 3rd January, 1927, when the Act I of 1925 was still in force and the question was whether the applications under S. 53 (4) of the Act I of 1925 did not lie in respect of schemes settled by courts before the Act and lay only in respect of schemes settled subsequently,

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*C. R. Ps. Nos. 1734 to 1736 of 1928. 18th August, 1932.

1. (1883) L. R 11 I. A. 37: I. L. R. 6 A. 269 (P. C.).
2. (1921) L. R. 48 I. A. 187: I. L. R. 48 Cal. 499: 40 M. L. J. 423 (P. C.).
3. (1922) L. R. 49 I. A. 129: I. L. R. 45 Mad. 320: 43 M. L. J. 78 (P. C.).

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Held, that the schemes settled by courts under S 92 of the Civil Procedure Code referred to in S 71 of the Act I of 1925 must be only those which had been already settled. To construe the section otherwise would be to stultify the beneficent effect of the scheme of the Act by making it possible for the very thing to be done which the Act was intended to prevent, *viz.*, unending litigation about the management of religious endowments. *Chinnan* v *Sundaresa*, A I. R 1929 Mad. 322, referred to.

On the next question whether such applications under S. 53 (4) of the Act of 1925 could be continued after the passing of the Act II of 1927 on the 19th January, 1927, under which S. 57 (4) provided that schemes of administration which under S. 75 were deemed to be schemes settled under the Act, *i.e.*, schemes settled by a Court under S 92, Civil Procedure Code, must be modified or cancelled only by a suit and not otherwise,

Held, that S. 75 (4) of Act II of 1927 was certainly not intended to be retrospective and could apply only to proceedings taken after it had come into force

The only provision in the Act of 1927 about continuation of proceedings begun under the Act of 1925 is S. 7 (2). It says that all proceedings taken under the earlier Act may be continued after that Act in so far as they are not inconsistent with the provisions of this Act. There is nothing in S. 75 (4) which is inconsistent with continuing the application presented already because as already said all that S. 75 says is that after the new Act, proceedings for modifications must be begun by way of suit. There being nothing in the Act which expresses any contrary intention, the ordinary rule of interpreting repealing legislation holds especially in view of S. 7 (2). It is necessary to point out that it is not necessary to convert these applications into suits, nor is there any question of court-fees.

Petitions under S. 115 of Act V of 1908 and S 107 of the Government of India Act praying the High Court to revise the orders of the District Court of Guntur, dated 2nd July, 1928 and made in Original Petitions Nos. 5, 6 and 27 respectively.

P. Venkataramana Rao for petitioner.

V. S. Narasimhachari for respondents.

The Court delivered the following

JUDGMENT.—These petitions by the Hindu Religious Endowments Board arise from applications under S. 53, cl. (4) of Act I of 1925, the first Hindu Religious Endowments Act which was afterwards repealed by Act II of 1927. The applications were severally for the modification of schemes which had been settled in respect of three temples by the Civil Courts and were made on the 3rd January, 1927, when the first Act was still in force. They were opposed by the counter-petitioners concerned and were dismissed by the learned District Judge on a preliminary point. That point is that applications under S. 53 (4) will not lie in respect of schemes settled by Courts before the Act and will lie only in respect of schemes settled subsequently. For this opinion the learned Judge relied on a decision of Srinivasa Aiyangar, J., in *Chinnan* v. *Sundaresa*[1].

1. A. I. R. 1929 Mad. 322.

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That was not a decision on this point, although there is an observation to the effect that the scheme under consideration in that case was of an earlier date than the Act of 1927 and therefore S. 75 of that Act corresponding to S. 71 of the Act of 1925 does not apply to the scheme. The matter before the learned Judge arose out of an application before the Subordinate Judge of Cuddalore made under "the liberty to apply" clause in a scheme which had been framed and the Subordinate Judge in that application removed the petitioner, trustee. The trustee brought up the matter to this Court and submitted that the "liberty to apply" clause in pursuance of which proceedings had originated against him was itself *ultra vires* and his dismissal was therefore illegal. With this argument the learned Judge concurred. It was then argued for the other side that under the Religious Endowments Act, which had been enacted while the proceedings against the petitioner were pending, whatever may have been the inherent fault of schemes passed before the Act they had all been cured and validated by S. 71 of the Act of 1925, corresponding to S. 75 of the Act of 1927. The true answer to this, I venture to think, was that the Religious Endowments Act did not purport to do anything of the kind. All that the above section meant was that schemes passed by the Civil Courts before the Act must be deemed to have been passed under the Act. Mark why. In order that they may be dealt with under the Act—*inter alia* under S. 53 of the Act of 1925. (S. 57 of the Act of 1927.) There was no question of validation or invalidation of any clause or provision in any scheme which was *ultra vires* of the Court. But the answer given by the learned Judge was that S. 75 of the Act of 1927 applied only to schemes settled after that Act. I cannot convince myself that the above observation was the result of a deliberate opinion. In any case I am not able to agree with it Ss. 53 (4) and 71 of the Act of 1925 are clear and explicit. S. 53 (4) refers *inter alia* to any scheme of administration which under S. 71 is deemed to be a scheme settled under the Act; and it says that all such schemes may be modified or cancelled by the Court on the application of the Board. S. 71 says that

"where the administration of a religious endowment is governed by any scheme settled under S. 92 of the Code of Civil Procedure such scheme shall be deemed to be a scheme settled under this Act, and such scheme may be modified or cancelled in the manner provided by this Act;"

in other words, may be modified or cancelled by the procedure laid down in S. 53. The reference in S. 71 to schemes

settled under S. 92 can apply only to schemes settled before the Act for the reason that under S. 69 (2) of the Act future suits under S. 92, Civil Procedure Code, are prohibited and that section is to have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no such suits can be brought except under the Act. Therefore the schemes settled by Courts under S. 92 referred to in the section must be only those which had been already settled. To construe the section otherwise would be to stultify the beneficent effect of the scheme of the Act, by making it possible for the very thing to be done which the Act was intended to prevent, *viz.*, unending litigation about the management of religious endowments. I have no hesitation in thinking that the objection by which the learned District Judge thought himself bound does not exist.

Another point raised in this Court for the respondents is that although these applications may have been competent at the time when they were presented, *i.e.*, on the 3rd January, 1927, yet as soon as the Act II of 1927 was passed, *i.e.*, on the 19th January, 1927, their continuance became incompetent because in the corresponding section in the new Act, *viz.*, S. 57 (4), it is provided that schemes of administration which under S. 75 are deemed to be schemes settled under the Act, *i.e.*, schemes settled by a Court under S. 92, must be modified or cancelled only by suit and not otherwise, instead of by application as was provided in S. 53 (4) of the earlier Act. The learned Judge himself was not inclined to accede to this objection, because he thought that there was nothing under the Act of 1927 to prevent the old applications being continued if necessary by payment of additional court-fees.

The respondents' learned advocate canvassed this opinion of the learned Judge and says that after the new Act it would be illegal to continue the old applications. The argument is as follows:—No doubt S. 8 (*f*) of the Madras General Clauses Act says that a repealing Act shall not affect any legal proceeding in respect of any rights, etc., required beforehand and that such legal proceeding may be continued as if the repealing Act had not been passed. But this is subject, according to S. 4, to there being nothing in the repealing Act to express a contrary intention. There is a contrary intention expressed in the Religious Endowments Act of 1927 to the effect that modifica-

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tions and cancellation of schemes of administration can only take place by suit and not otherwise. Therefore to allow the old applications to continue is contrary to S. 75 (4). The whole of this argument is based upon a misapprehension because S. 75 of the Act of 1927 was certainly not intended to be retrospective and can apply only to proceedings taken after it came into force. It is one thing to say that under the Act of 1927 the modification of a scheme can be obtained only by a suit. It is another thing to say that by reason of that section it is illegal to continue applications which had already been legally filed. The only provision in the Act of 1927 about continuation of proceedings begun under the Act of 1925 is S. 7 (2). It says that all proceedings taken under the earlier Act may be continued after that Act in so far as they are not inconsistent with the provisions of this Act. There is nothing in S. 75 (4) which is inconsistent with continuing the application presented already because as already said all that S. 75 says is that after the new Act the proceedings for modification must be begun by way of suit. There being nothing in the Act which expresses any contrary intention, the ordinary rule of interpreting repealing legislation holds especially in view of S. 7 (2). The learned Judge's view on this point was right. But it is necessary to point out that it is not necessary to convert these applications into suits; nor as far as I can see is there any question of court-fees. The applications must be heard and decided on the footing that they were validly presented and that they have been improperly dismissed

The respondents' advocate wanted to raise a question that one of the reliefs claimed in the petition was not available in these proceedings. That does not now arise and may be raised before the Lower Court.

The order of the Lower Court is set aside and the petitions sent back to the District Court for disposal according to law. The petitioner will have his costs in three petitions.

K. C. *Order set aside and petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

T. K. Peramanayagam Pillai .. *Appellant* (Judgment-debtor—Respondent)*

v.

Raman Chettiar .. *Respondent (Petitioner—Decree-holder).*

Perama-nayagam Pillai *v.* Raman Chettiar.

Limitation Act (IX of 1908), S. 19 (2)—Insolvency of judgment-debtor—Schedule containing acknowledgment—Date being stroked out—Evidence as to date of acknowledgment—Admissibility.

Where a judgment-debtor became insolvent and the schedule of assets and liabilities filed by him contained an acknowledgment of liability as regards the suit claim but the schedule contained a date that had been stroked out, which, if taken into account, would bar the later execution application,

Held, that for purposes of S. 19 (2) of the Limitation Act the writing containing the acknowledgment should be taken to be undated and evidence may be given as to its correct date.

Sayad Gulamali v. *Miyabhai*, (1901) I. L. R. 26 Bom. 128, disapproved.

Appeal against the order of the District Court of Tinnevelly, dated the 24th day of February, 1927, in A. S. No. 5 of 1927, preferred against the order of the Court of the District Munsif of Tinnevelly, dated the 10th day of December, 1926, in E. P. No. 257 of 1926 in O. S. No. 175 of 1916.

K. V. Venkatasubramania Aiyar for appellant.

E. Vinayaka Rao for respondent.

The Court delivered the following

JUDGMENT.—The judgment-debtor is the appellant. This Civil Miscellaneous Second Appeal arises out of an application filed by the decree-holder under O. 21, R. 38, Civil Procedure Code, to execute the decree in O. S. No. 175 of 1916 (District Munsif's Court, Tinnevelly) by arrest of the appellant. The question for decision is whether the decree sought to be executed is barred by limitation.

The date of the decree is 11th December, 1917. The application for execution previous to the present application (Exhibit E) was made on the 12th April, 1922. That was in time when it was filed. The present application E. P. No. 257 of 1926 was made on the 21st April, 1926. *Prima facie* it is barred by limitation as having been made more than three years from the date of the last application But the respondent

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*A. A. A. O. No. 234 of 1927. 19th September, 1932.

Peramanayagam Pillai *v.* Raman Chettiar.

decree-holder contended that it was saved from the bar of limitation under S. 19 of the Limitation Act by an acknowledgment made by the judgment-debtor within three years from the date of the last execution application and that the present execution application has been filed within three years from the date of the acknowledgment; and that it is therefore within time. This plea was accepted by both the Lower Courts.

The facts relating to the acknowledgment are these. The judgment-debtor became an insolvent. He filed a schedule of assets and liabilities before the Official Receiver. This schedule is Ex. III. It is not disputed that this contains an acknowledgment of liability. The question is, when was this acknowledgment made. The date 30th March, 1923, appears on Ex. III, but this has been stroked out. If this is the date of the acknowledgment then the present application, dated 21st April, 1926, as having been made more than three years from that date, is clearly barred by limitation. We are not able to say why the date appearing on Ex. III was stroked out. The document does not show when it was actually filed before the Official Receiver as it does not bear the stamp of his office. It must have been filed before him either on the 31st July, 1923 or some time after that date. This is inferred from Ex. V, a petition made by the insolvent to the Official Receiver promising to file the list in a week. Ex. V is dated 31st July, 1923 The District Munsif held that the respondent has admitted the present decree debt either on the 31st July, 1923, or on some day after that date and that the present application is not barred as it has been made within three years from that date. This decision was upheld by the learned District Judge.

In this second appeal Mr. Venkatasubramanian for the appellant argues that the acknowledgment should be considered to have been made on the 30th March, 1923, though that date has been stroked out, that when once the document bears a date it is not open to the parties to show by oral evidence that it was not written on that date having regard to the prohibition contained in cl. (2) of S. 19 of the Limitation Act, and that in any event the Lower Courts are wrong in calculating the period for the present application from the date of "filing" of the acknowledgment petition, as under law the time from which they should calculate it is the time when it was made and not the time when the petition containing it was filed; or in other

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words, that the *filing* of the petition has nothing to do with the *time when the acknowledgment was made.* The first two arguments are supported by a decision in *Sayad Gulamali* v. *Miyabhai*[1], which is to this effect:

"Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under S. 19, para. 2 of the Indian Limitation Act, 1877."

Logically it must follow from this decision that if by mistake a wrong date is inserted in a document, oral evidence is inadmissible to prove the mistake. An interpretation of cl. (2) of S. 19 leading to this position seems to me hardly justifiable. Having regard to the fact that the date of the document containing the acknowledgment has been scored out, I think that for the purposes of cl. (2) of S. 19 we may hold that the writing containing the acknowledgment is undated, and then evidence may be given as to the correct date of the acknowledgment. Though a document with a date stroked out by the party may be said to bear a date strictly speaking, and therefore not be undated, having regard to the obvious fact that the parties by striking it out have shown that it is not to be the date of the document, I think it can hardly be correct to calculate the time of acknowledgment from that date as the true date. In this case, as pointed out by Mr. Vinayaka Rao for the respondent it is not quite clear whether the Lower Court's conclusion regarding the time of acknowledgment is based so much on the oral evidence as on an inference from Ex. V. Though oral evidence was adduced in the case, the conclusion that Ex. III must be considered to have been filed on or after the 31st July, 1923, is solely based on the inference from Ex. V. If this view can be held to be correct as I think it may well be, then the occasion for the application of *Sayad Gulamali* v. *Miyabhai*[1] does not arise as the true date can be proved by other than oral evidence. However, it is not necessary to discuss this aspect of the question any further.

The last argument of Mr. Venkatasubramanian will be found to be without any substance if the finding of the Lower Courts is properly understood. It is true that the learned Judges have calculated the period of limitation for the present application from the date of the filing of Ex. III. But they have done so not because that the date of the filing has anything to

1. (1901) I. L R. 26 Bom. 128.

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do with the question under S. 19 of the Limitation Act but because they consider that acknowledgment in the absence of other evidence must be held to have been made when the document was filed: that is all. This is clear from the words used by the District Munsif. He says:

"It is clear from Ex. III that the respondent *has admitted the present decree debt* either on the 31st July, 1923 or on some day after that date" (The italics are mine)

and the learned District Judge has confirmed this opinion of the learned District Munsif. There is therefore no reason for calling for a fresh finding as to the time when the decree debt was acknowledged by the judgment-debtor.

For the above reasons this Civil Miscellaneous Second Appeal is dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Thadapalli Pedda Subba Rao .. *Appellant** (*Respondent*)

v.

Lavu Ankamma and another .. *Respondents* (*Assignee-decree-holder—Petitioner and Plaintiff—Original decree-holder*).

Subba Rao *v.* Ankamma.

Civil Procedure Code (*V of* 1908), *Ss.* 39 *and* 41—*Transfer of decree for execution—Application by assignee-decree-holder to Court which passed decree—Sustainability—Proceeding if need be stayed till receipt of certificate.*

Where after a decree was transmitted under S. 39, Civil Procedure Code, to another Court for execution, an assignee of the decree-holder applied to the Court which passed the decree for being recognised as assignee and for concurrent execution,

Held, that the application by the assignee-decree-holder was legally sustainable and the Court need not, after entertaining the application, stay its hand until the certificate prescribed by S 41 of the Code had been received or the records had been returned.

Appeal against the order of the Court of the Subordinate Judge of Negapatam, dated the 18th day of November, 1929 and made in E. A. No. 315 of 1929 in O. S. No. 4 of 1913 on the file of the Court of the Temporary Subordinate Judge of Tanjore.

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*C. M. A. No. 173 of 1930. 2nd September, 1932.

C. S. Venkatachariar and *H. Suryanarayana* for appellant.

N. Rama Rao and *Watrap S. Subrahmania Aiyar* for respondents.

The Court delivered the following

Venkata-subba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—Mr. Venkatachari for the appellant contends that the execution petition should not have been treated by the Lower Court as one that satisfied the requirements of the law. The petition was filed by the assignee-decree-holder. It was in the form prescribed by the Code and prayed first, that the petitioner should be recognised as the assignee decree-holder; secondly, that the fact of his being so recognised should be communicated to the Kistna District Court and the Bapatla Sub-Court where the execution of the decree was being carried on; and thirdly, that concurrent execution, which had already been ordered, should be allowed to be proceeded with.

Mr. Venkatachari's contention is that, when once a decree is transmitted under S. 39 of the Code to another Court for execution, no execution application can be made to the Court which passed the decree, until the certificate prescribed by S. 41 has been received by that Court. I am unable to follow this argument, for in principle I find it difficult to understand why the original Court is incompetent to entertain an application in the absence of the certificate under S. 41. Mr. Venkatachari says that without the certificate the Court will not be in a position to find out what the amount due to the petitioner is. He forgets that the execution application gives the necessary information and the Courts usually act on such material as is placed before them. Apart from the reason of the thing, the learned counsel has not been able to point to any provision, which forbids the Court to entertain such an application. The cases relied upon by him do not support him in the least. I am not concerned with the correctness or otherwise of the decision in *Rangaswami* v. *Sheshappa.*[1] The petitioner before us is not the decree-holder as in that case but the decree-holder's assignee, and under O. 21, R. 16 the only Court to which he is entitled to apply for execution is the original Court; in other words, the Court which passed the decree. In *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Baliar Simhulu Bahadur*[2], after

1. (1922) I. L. R. 47 Bom. 56.
2. (1912) I. L. R. 37 Mad. 231: 23 M. L. J. 236.

Subba Rao *v.* Ankamma.

Venkatasubba Rao, J.

the decree had been transmitted to the Parvatipur District Munsif's Court, and certain properties had been attached by that Court, the decree-holder applied to the District Court, without asking for concurrent execution, for the sale of the properties already attached by the other Court. That course was held to be irregular, and I fail to see how the decision has any bearing upon the point we have to decide. From *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Baliar Simhulu Bahadur*[1] an appeal was taken to the Privy Council and its judgment is reported in *Maharajah of Bobbili* v. *Narasaraju Bahadur*[2]. All that their Lordships held was that, as the property concerned was within the local limits of the jurisdiction of the Munsif's Court and as that property had already been attached by that Court, the District Court was not the proper Court to execute the decree by sale of that property and that the proper Court to which the application should have been made was the Munsif's Court. This case again has nothing to do with the point now raised. The judgment of Devadoss, J., in *Ayyaru Pillai* v. *Varadaraja Pillai*[3] has also no bearing on the question to be decided. That case held that an application to the transferee Court by the assignee-decree-holder, to send back the decree to the original Court, is a step-in-aid of execution. I fail to see how that case is in the least relevant to the point we have to decide. We have here nothing to do with the powers of the transferee Court, the only question being, "Is the execution application made to the original Court competent or not?" I am satisfied that Mr. Venkatachari's contention is not only opposed to principle but does not receive the slightest support from the provisions of the Code.

The appeal is dismissed with costs of the assignee-decree-holder.

Reilly, J.

Reilly, J.—I agree. Mr. Venkatachariar for the judgment-debtor set out in this appeal to satisfy us that the Subordinate Judge of Negapatam, that is the Judge of the Court which made the decree, had no jurisdiction to entertain this application of the assignee-decree-holder. The learned Subordinate Judge has disposed of that contention very neatly and effectively in paragraph 19 of his judgment, in which he says:

1. (1912) I. L. R. 37 M. 231: 23 M. L. J. 236.
2. (1916) L. R. 43 I. A. 238: I. L. R. 39 Mad. 640: 31 M. L. J. 300 (P.C.).
3. (1925) 50 M. L. J. 116.

"In this application the petitioner is not praying for any relief which the Court cannot grant. He is asking for a relief which only this Court can grant."

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Reilly, J.

In the end Mr. Venkatachariar, as I understand him, does not deny that the only Court to which the assignee-decree-holder could go for the recognition of his assignment was the Court of the Subordinate Judge of Negapatam. But, being unable eventually to dispute that, he has tried to persuade us that, although the Subordinate Judge of Negapatam could properly entertain the assignee-decree-holder's application, he could not grant the assignee-decree-holder's prayers in that application until the transferee Courts, the District Court of Kistna and the Court of the Subordinate Judge of Bapatla, to which the decree had been previously transferred for execution, had reported either that no satisfaction had been obtained in their Courts or that complete satisfaction had not been obtained. His eventual contention appears to be that the Subordinate Judge of Negapatam should have stayed his hand until the records had come back from those Courts—or at any rate until certificates had been received from those Courts that satisfaction had not been completely obtained. There is no provision in the Code to that effect, and, so far as I can see, no reported decision which goes to that length. Even the decision of Mr. Justice Devadoss, in *Ayyaru Pillai* v. *Varadaraja Pillai*[1], to which we have been referred, does not go so far as that; nor was that the point which the learned Judge immediately had to decide. And there appears to be no necessity nor reason why the Subordinate Judge of Negapatam should stay his hand until he got such certificates from the transferee Courts. Notice of the assignee-decree-holder's application for recognition of his assignment had to be given to the judgment-debtors, and it was open to them to represent to the Subordinate Judge of Negapatam that the decree had been completely satisfied or partly satisfied, if that was so. They were quite sufficiently protected by the procedure required by the Code that notice should be given to them. In my opinion Mr. Venkatachariar has not been successful in making out either that the law requires or that there is any necessity that the original Court in such a case should, after entertaining the assignee-decree-holder's application, as it is now admitted must be done, stay its hand until certificates

1. (1925) 50 M. L. J. 116.

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Reilly, J.

have been received from the transferee Courts or the records have been returned. In my opinion the learned Subordinate Judge's order was right, and I agree that this appeal should be dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Raja Rajeswara Sethupathi *alias* Muthuramalinga Sethupathi (deceased), Rajah of Ramnad, through his authorised Dewan T. S. Jambunatha Aiyar and another .. *Appellants* (Appellant decree-holder and his L. R.)*

v.

Kuppuswami Pillai .. *Respondent.*

Rajah of Ramnad *v.* Kuppuswami Pillai.

Limitation Act (IX of 1908), Art. 182 (5)—Application to Court to take a step-in-aid—Remittance of subsistence allowance for debtor in jail.

The despatch by money order of the subsistence allowance for the judgment-debtor in jail to the Jail Superintendent who, under O. 21, R. 39 (4) of the Civil Procedure Code, is the proper officer to whom the payment should be made, is "an application to the proper Court to take a step-in-aid of execution," within the meaning of Art. 182 (5) of the Limitation Act.

Appeal against the order of the Court of the Temporary Subordinate Judge, Devakottah, dated 5th February, 1927, in A. S. No. 34 of 1926, preferred against the order of the Court of the District Munsif of Devakottah, dated 26th August, 1926, in E. P. No. 382 of 1926 in O. S. No. 908 of 1917.

S. Sundararaja Aiyangar for appellants.

V. Ramaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT.—The question in this appeal is whether the application for execution is barred by limitation. The decree is dated 1st December, 1917. The application for execution was presented on 28th June, 1926, the date on which the first Court re-opened after the summer recess of 1926. The prior execution application was presented on 1st February, 1923. It is clear that the present application would be barred by

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* C. M. S. A. No. 164 of 1927. 5th August, 1932.

Rajah of Ramnad *v.* Kuppuswami Pillai.

limitation unless the facts relied upon by the decree-holder are sufficient to save limitation. The judgment-debtor was committed to jail on 28th February, 1923. This decree-holder has remitted by postal money orders to the Jail Superintendent subsistence allowances necessary for the detention of the judgment-debtor in prison. Those remittances had been made on 24th March, 1923, 23rd April, 1923, 23rd May, 1923 and 25th June, 1923. It is argued that the remittance made on 25th June, 1923, is sufficient to save limitation as being a step-in-aid of execution. If this payment could be considered to be a step-in-aid of execution, it is clear that the present application is not barred by limitation. The Lower Courts held that as the payment was made to the Superintendent of Jail, it cannot be considered that the application was made to the "proper Court" within the meaning of Art. 182 of the Limitation Act, to save limitation and therefore the present petition is barred by limitation.

The respondent relies on a decision of this Court in *Ramudu Chetti* v. *Varadaraja Chariar*[1] by Krishnan, J. The facts of that case are not very clear. Apparently the learned Judge's view is that if payment was made within three years of the prior application, then such payment would be a step-in-aid of execution provided there was an application. And with regard to the application the learned Judge says:

"We cannot presume that an application would have been made, when the decree-holder paid such charges."

Whether the application should be one to the Court or whether it would be enough if that was made to the Superintendent of Jail is not made clear in that judgment. But both the Courts in that case seem to have been of the opinion that a payment of maintenance charges would be a step-in-aid of execution. The first appellate Court did not consider the question whether there was an application at all because the payment in that case was made admittedly three years after the previous application. Therefore I find that that decision does not render much help for deciding this case.

It is argued that the payment of maintenance charges should be to the Court and since it was not made into the Court, it cannot be said that there was any request made to the Court to take a step-in-aid of execution. Under O. 21, R. 39 (4),

1. (1920) 13 L. W. 289.

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Civil Procedure Code, the first payment in connection with the arrest of the judgment-debtor is to be made to the Court and the subsequent payments should be made to the officer in charge of the civil prison. So if an application was made to the Court on a subsequent occasion to receive the subsistence charges, that application would not be an application in accordance with the provisions of O. 21, R. 39 (4); the application should be made according to the provisions of the Code to the Superintendent of Jail who is constituted by the Code as the proper officer to receive the application. In my opinion an application made to him should in the circumstances be considered to be an application made to the Court under Art. 182 (5) of the Limitation Act.

The next question is whether it can be said that there was an application in this case. It is argued that there was no such application. The facts show that the amounts were sent by money order. In the circumstances of the case I am inclined to accept the despatch by money order to the Jail Superintendent as amounting to an application.

For the above reasons I am of opinion that the remittance made by the decree-holder on 25th June, 1923, in the present case is a step-in-aid of execution and therefore the present application is not barred by limitation. In the result the orders of the Lower Courts are set aside, and the petition will be taken on file and disposed of according to the merits by the District Munsif. The appellant will get his costs throughout.

S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Kovuru Subbayya and others .. *Petitioners** (*Accused*)

v.

Peta Veeraya .. *Respondent* (*Complainant*).

Subbayya *v.* Veeraya.

Criminal Procedure Code (*V of* 1898), *S.* 162—*Applicability—Statement to police officer during investigation of offence other than that under trial.*

A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Evidence Act and in the Code of Criminal Procedure.

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* Cr. R. C. No. 214 of 1932. 25th July, 1932.

Subbayya v. Veeraya.

It is open to the accused to cross-examine the complainant regarding a statement made by the complainant to the police when they were investigating an offence different from the one for which the accused is being tried. To such a statement, neither S. 162 of the Criminal Procedure Code nor the proviso thereto has any application.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Ponnuru (Guntur District), dated 21st January, 1932 and made in C. C. No. 315 of 1931.

P. Satyanarayana Rao for petitioners.

K. Kotayya for respondent.

K. N. Ganapati for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

Jackson, J.

ORDER. *Jackson, J.*—The point raised in this revision case is whether on behalf of the accused in an assault case the complainant can be cross-examined by confronting him with a statement which the complainant made to the police when they were investigating a theft case, a case different from the case of assault. (This case of assault was not under investigation by the police.)

A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Evidence Act and in the Code of Criminal Procedure.

In S. 162, Criminal Procedure Code, it is laid down that a statement made to the police in the course of an investigation of an offence cannot be used as evidence at any trial in respect of that offence, with the proviso that such a statement may be used by the accused to contradict a prosecution witness.

But when the statement has not been made in the course of investigating the offence in respect of which the trial is held neither the main part of S. 162 nor the proviso has any application.

If in an investigation of theft *A* says to the police that *B* and *C* beat him, that statement can be proved when *D* and *E* are being tried for assault, the trial in no way being in respect of the investigated theft. Though of course if in any way the assault had been under investigation by the police the statutory bar would apply.

Subbayya
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Jackson, J.

The Magistrate did wrong therefore to shut out this evidence. His mistake is apparently reading S. 162 as "disallowing all statements to police officers," as though there were a full stop after "for any purpose". But these words are clearly qualified by (for any purpose) "at any trial in respect of any offence under investigation at the time when such statement was made".

If it is sought to use the statement at a trial in respect of some offence which was not being investigated when the statement was made, there is no statutory bar whatsoever to its use. And of course the proviso only applies to such trials in which there is a statutory bar.

The petition must be allowed and the Magistrate is ordered to proceed as directed herein.

S. R. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE BURN.

M. S. M. M. Meyyappa Chettiar .. *Petitioner* (Assessee)*

v.

The Commissioner of Income-tax, Madras .. *Respondent (Referring Officer).*

F. B.

Meyyappa Chettiar
v.
The Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), S. 4 (2)—Profits received in British India—Foreign business having two funds, one taxed and the other not—Remittance to British India—Presumption—Nature of—Taxed fund lent out and not available at the time of remittance—Liability of remittance to tax.

Where there are two funds in the assessee's foreign business, one which has already been subjected to income-tax in British India and another which is still liable to income-tax, it may be reasonable to presume that a remittance made to British India was out of the fund that has already been taxed. That, however, is not an irrebuttable presumption and where the book entries of the assessee himself show that the whole of the fund which had been subjected to income-tax was invested with the constituents of the assessee's firm and so remained at the time when the remittance in question was made to British India, so that the remittance could not possibly have been a part of that fund, the presumption, if any, in favour of the assessee is rebutted and the general presumption applies, namely, that the remittance was out of profits, liable to be taxed.

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*O. P. No. 54 of 1931. 30th August, 1932.

F. B.

Meyyappa Chettiar
v.
The Commissioner of Income-tax, Madras.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

1. In accordance with the High Court's order quoted above I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (3) of the Indian Income-tax Act (XI of 1922).

2. The petitioner is M. S. M. M. Meyyappa Chettiar of Karaikudi, Ramnad District. He owns banking businesses in various places, among them being Ipoh in the Federated Malay States and Rangoon in British India. He has been assessed for the year 1929-30 through his mother and guardian, Meyyammal Achi, as he was then a minor, on his income from property, dividends, the profits of his businesses in British India and on such of the profits of the businesses outside British India as were remitted to him in British India.

3. A sum of Rs. 4,10,000 was remitted by the petitioner's Ipoh business to his Rangoon business during the year 1926-27 (Tamil year Akshaya) prior to the close of December, 1926. This money after its receipt in Rangoon was employed in the Rangoon business and it became merged in this business. Before the end of March, 1927, five sums aggregating to Rs. 4,08,662 were remitted by the Rangoon business to the Ipoh business as follows:—

			Rs.	$
1.	17—2—1927	..	77,250	(50,000)
2.	26—2—1927	..	1,00,912	(65,000)
3.	4—3—1927	..	93,000	(60,000)
4.	11—3—1927	..	77,500	(50,000)
5.	28—3—1927	..	60,000	(38,799)
			Rs. 4,08,662	

The amounts thus received from Rangoon were used by Ipoh to advance to its customers. The following are the entries regarding these transactions in the Ipoh books:—

			Dr. $	Cr. $
1.	17—2—27	Credit Rangoon Shop for amount received from Rangoon.	..	50,000
		Debit S. M. for amount advanced.	50,000	
2.	26—2—27	Credit Rangoon Shop for amount received from Rangoon.	..	65,000
		Debit Penang T. S. N. for amount advanced.	65,000	
3.	4—3—27	Credit Rangoon Shop for amount received from Rangoon.	..	60,000
		Debit S. M. for amount advanced.	59,000	
		Debit M. M. for amount advanced.	1,000	

F. B.

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			Dr. $	Cr. $
4.	11—3—27	Credit Rangoon Shop for amount received from Rangoon.	..	50,000
		Debit Penang T. S. N. for amount advanced.	50,000	
5.	28—3—27	Credit Rangoon Shop for amount received from Rangoon.	..	38,799
		Debit Penang K. V. Al. M. Rm. for amount advanced.	38,803	

The said remittance of Rs. 4,10,000 from Ipoh to Rangoon was included in the assessment made on the petitioner for the year, 1927-28, as a receipt of foreign profits and a sum of Rs. 91,262-14-0 was found due from the petitioner on 9th April, 1928, as tax for that year. In order to meet this demand made on him in British India an exactly equivalent sum was remitted by the petitioner's Ipoh shop to his Rangoon shop on 27th April, 1928, and the entries regarding this in the Ipoh and Rangoon books are as follows:—

	Ipoh Books.	Dr. $	Cr. $
27—4—1928	Credit Chartered Bank.	..	59,454·64 (Rs. 91,262-14-0)
	Debit Rangoon Shop for amount remitted to Rangoon including Telegram charges ($3·90 cents).	59,458·54	
	Rangoon Books.		
28—4—1928	Credit Suspense Account amount received from Ipoh for the payment of income-tax.	..	91,262-14-0
9—5—1928	Debit Suspense Account amount remitted into the Imperial Bank, Rangoon, for income-tax.	91,262-14-0	

4. For the assessment of the year 1929-30 (the assessment now in question) based on the income of the previous year, 1928-29, (Tamil year Vibhava), the Income-tax Officer, Karaikudi, 1st Circle, who was the Assessing Officer in this case included this sum of Rs. 91,262-14-0 as a remittance of foreign profit received by the petitioner in British India.

5. The petitioner's appeal to the Assistant Commissioner objecting to the inclusion in his assessment of this sum was unsuccessful.

6. The petitioner then filed an application before me under S. 66 (2) of the Act and required me to state a case and refer certain questions for the decision of the High Court. I declined to do so on the ground that no question of law arose for decision.

7. The petitioner thereupon moved the High Court under S. 66 (3) of the Act and in its order, dated 8th January, 1932, the

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High Court has directed me to state a case and refer the following question:

"Whether on the facts of this case any presumption as to the receipt of profits can be raised and, if it can, whether the presumption has not been rebutted."

8. The petitioner's contention is that the remittance now in question, *viz.*, Rs. 91,262-14-0, must be presumed to be part of the total sum of Rs. 4,08,662 remitted by Rangoon to Ipoh before the end of March, 1927 (and referred to in paragraph 3 above) and that it should also be presumed that this Rs. 4,08,662 is a return by Rangoon to Ipoh of the Rs. 4,10,000 remitted by Ipoh to Rangoon before the close of December, 1926, for the reason that the entries relating to these transactions are entered in a single account at Ipoh. I consider that this fact alone is no proof either of the claim that the remittance in question came from Rs. 4,08,662 remitted to Ipoh by Rangoon or of the claim that the Rs. 4,08,662 sent to Ipoh represented a return of part of the taxed profits of Ipoh, *viz.*, Rs. 4,10,000. The remittance in question was made to Rangoon to meet a definite personal liability of the petitioner that arose in the year, *viz.*, payment of income-tax and it was not treated in the Rangoon Accounts as a return of capital at all. I am therefore of opinion that the *prima facie* presumption of law in respect of such remittances applies to the remittance in question provided the petitioner had sufficient profits to cover the amount remitted. It is not denied that he had sufficient profits.

Then the only question that really arises is whether this presumption had been rebutted and the petitioner has proved that the remittance came out of his capital and not out of such taxable profits at Ipoh. With this view I have had the Ipoh Accounts examined again in my office. It will be seen from the entries extracted in paragraph 3 above that the five remittances totalling Rs. 4,08,662 were utilised by the Ipoh business in advancing loans to its customers on the very day of their receipt from Rangoon and that when the remittance of Rs. 91,262-14-0 was made on 27th April, 1928, more than a year after, it was made not out of the realisation of any of these loans but by a withdrawal from the Chartered Bank with which the petitioner's Ipoh shop has a running account. The remittance of Rs. 91,262-14-0 is not therefore in any way identifiable or connected with the aggregate of the remittances, *viz.*, 4,08,662, received by Ipoh from Rangoon and has to be considered by itself. In my opinion the petitioner has not rebutted the presumption that the remittance came out of profits taxable under S. 4 (2). I would therefore request your Lordships to answer accordingly.

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K. S. Krishnaswami Aiyangar for *R. Kesava Aiyangar* for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The question referred to us is—

"Whether on the facts of this case any presumption as to the receipt of profits can be raised and, if it can, whether the presumption has not been rebutted."

The facts of the case which can be stated quite shortly are as follows:—The assessee carries on a business in Rangoon; and in Ipoh he is the sole proprietor of a business, which at the material times it is alleged by the assessee earned no profit at all, and he is also a partner in another money-lending business with other persons which did result in a profit at the material times. In 1926 sums of money amounting to Rs. 4,10,000 were sent from Ipoh to Rangoon to the petitioner there, the last sum being a sum received in December, 1926. In the Rangoon books there is a ledger account for Ipoh and in Ipoh there is a ledger account for Rangoon and money passing from one place to the other is set out in the respective ledger accounts. The Income-tax authorities assessed that sum of Rs. 4,10,000 received from Ipoh by the petitioner in Rangoon to income-tax as being a remittance of foreign profits to British India and levied an income-tax of Rs. 91,262 odd upon it. The matter came before the High Court on a reference and the reference was answered against the petitioner (the same petitioner here) apparently not upon the merits but for some other reason; so that that assessment remains and a sum of Rs. 91,262 odd has been paid by the petitioner to the Income-tax authorities; and the question before us is, where did that sum of money come from?

Now it appears and it is quite plainly proved from the assessee's own books that in February and March, 1927, a large sum of money very nearly equivalent to the sum sent by Ipoh to Rangoon the previous year was sent by Rangoon to Ipoh, the total amount being Rs. 4,08,662. In order to pay the income-tax levied by the Income-tax authorities the assessee sent from Ipoh Rs. 91,262-14-0 by telegram from the Chartered Bank on the 27th April, 1928, and the receipt of that sum was duly entered in the Rangoon books as a credit on the 28th April, 1928, and as a debit to the suspense account on the

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9th May, 1928. The petitioner's case here is that tax having been paid on the Rs. 4,10,000 sent from Ipoh to Rangoon in 1926 that was a tax-free fund and that tax-free fund or amount was sent back to Ipoh where there was that tax-free fund or tax-paid fund in the hands of the assessee and in addition to that there was another fund which was a profit fund which of course would be liable to income-tax. We are not deciding here whether the money sent from Rangoon to Ipoh was in fact the money sent from Ipoh to Rangoon the previous year. We are dealing with this reference merely on the assumption that it was. The assessee's endeavour here and before the Income-tax Commissioner was to show that the Rs. 91,262 odd sent from Ipoh to Rangoon with which to pay the income-tax levied came out of the tax-paid or tax-free fund in his hands at Ipoh. Had he been able to prove any such thing as that, then, in our opinion, he would have been entitled to maintain that, as the fund had already been taxed, this sum of Rs. 91,262 odd could not be taxed again because that sum has been assessed to income-tax by the Income-tax Commissioner as a remittance received in British India out of profits of the foreign firm at Ipoh. We are asked to say that the presumption that a remittance is out of profits has been rebutted here, the ordinary presumption being that, when money is received in British India from another country, the remittance is out of profits. The assessee however contends that an overriding presumption in their favour has been raised and that is that where there are two funds at the disposal of a person, one a fund upon which income-tax has been levied and another fund which is still liable to income-tax the presumption is that the former will be drawn upon to make payments and not the latter and that this presumption has not been rebutted in this case. What do the entries in the assessee's account books at Ipoh show? The Income-tax Commissioner has found that the whole of the money sent from Rangoon to Ipoh, namely, Rs. 4,08,662, was, when it was received in Ipoh, re-invested with constituents and that, that being so, the assessee cannot be heard to say that the Rs. 91,262 odd remitted by him from Ipoh to Rangoon for the purpose of paying income-tax came out of that fund. The following are the entries to be found in the books of the assessee:—On the 17th February, 1927, a sum of Rs. 77,250, equivalent to $50,000, was remitted by the Rangoon business to

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the Ipoh business; on the 26th February, 1927, a sum of Rs. 1,00,912, equivalent to $65,000, was remitted; on the 4th March, 1927, a sum of Rs. 93,000, equivalent to $60,000, was remitted; on the 11th March, 1927, a sum of Rs. 77,500, equivalent to $50,000, was remitted; and finally on the 28th March, 1927, a sum of Rs. 60,000, equivalent to $38,799, was remitted, making a total of Rs. 4,08,662. Let us see how these sums of money were dealt with and the dates upon which they were. On the 17th February, 1927, the same date on which the sum of $50,000 was received, an identical sum was advanced to a constituent; on the 26th February, 1927, the date on which the sum of $65,000 was received, similarly an identical sum was lent out to somebody in Penang; on the 4th March, 1927, the same date on which the sum of $60,000 was received, a sum of $59,000 was advanced to a constituent and a sum of $1,000 was advanced to another, making a total of $60,000; on the 11th March, 1927, the same date on which the sum of $50,000 was received, an identical amount was lent out to a constituent in Penang; and on the 28th March, 1927, the same date upon which the sum of $38,799 was received, a sum of $38,803 was advanced to another constituent; so that, with the exception of a very small amount, the whole of the Rs. 4,08,662 was by the 28th March, 1927, re-invested with other constituents and was no longer in the hands of the assessee. We have got to consider again the date upon which the remittance in order to pay income-tax took place. That was on the 27th April, 1928. At that time according to the books the whole of the money received from Rangoon was still invested with the constituents of the assessee's firm. Therefore, upon the assessee's own showing and by reason of the entries made in his own books, presumably made upon instructions by the agent who was carrying on the business there, none of the Rs. 91,262 odd ever came out of the fund remitted from Rangoon to Ipoh. That being so, it is obvious that it did not come out of the fund upon which income-tax had already been paid. But in spite of these very clear entries which are admissions completely destructive of the assessee's case, we are asked to say that they cannot be taken as evidence of the fact that this sum of money received from Rangoon was not intact in the hands of the assessee and that the Rs. 91,262 odd did not come out of it. In support of this contention a passage in the judgment of the Lord Chancellor,

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Lord Haldane, in *Sugden* v. *Leeds Corporation*,[1] was relied upon. The passage referred to is at page 253 and it is as follows:—

> "If the annual payments would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of tax he has deducted."

We are told that in that case the Leeds Corporation in their books of account had shown that sums of money had been paid out of certain sources of income, that they had the right to make the payments out of another fund or another source of income and that in spite of their accounts showing that they had made these payments out of a certain source, they were entitled to say thereafter that the payments were made out of another fund. Whatever may be the facts of that case, I cannot for one moment think that that observation of the Lord Chancellor can have any application to the facts of this case. It is argued, of course, that here there is the certain presumption, that is to say, that where a person has a fund in his hands which has already been subjected to income-tax and another fund in his hands which is liable to income-tax, if he is called upon to make any payment in the course of his business or otherwise, he is much more likely to make the payment out of the fund which has already been taxed rather than out of the fund which remains to be taxed. That may be a reasonable presumption to draw but, in my view, this is not a case at all of drawing any presumption. No presumption of the kind suggested by the assessee arises here, in view of the fact that we have got the book entries of the assessee himself which clearly show that the remittance of of Rs. 91,262 odd was not made out of a fund which had already been subjected to income-tax. There were profits in the Ipoh business and the ordinary presumption arises therefore that there being profits more than sufficient or sufficient to cover the amount of the sum remitted, the remittance of Rs. 91,262 odd was a remittance from the profits of Ipoh business. To allow the contention of the assessee here would be to say that where a person has two funds in his possession, one of them being a fund which has been subjected to income-tax and the other being a fund which remains to be taxed, the presumption that any remittance he makes is out of the one

1. 6 T. C. 211.

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already subjected to tax can never be rebutted, or it is an irrebuttable presumption. That of course cannot possibly be the law. In this case even if that presumption had arisen, it would be clearly rebutted by the book entries of the assessee himself. In what other way can the Income-tax authorities rebut such a presumption? If they are not to be allowed to pray in aid the book entries made by the assessee himself or by his agent, it is very difficult to see how they can possibly rebut the presumption which is sought to be raised in aid of the assessee here.

Another case, namely, the Quilon case, *Subbiah Aiyar* v. *The Commissioner of Income-tax, Madras*,[1] was referred to. There the facts that book entries had been made by the assessee, that the payments made from Quilon to British India were out of current account, that the book entries made by the assessee in his British India books showed that the remittance was of capital and that the genuineness of those entries was not challenged were taken as circumstances rebutting the ordinary presumption which arose that the remittance from Quilon to British India was a remittance out of profits. It is an amazing contention that though an assessee can avail himself of book entries in order to rebut such a presumption, the income-tax authorities are not similarly entitled to rely upon book entries to rebut any other presumptions which may arise or which may be raised in favour of an assessee.

Under these circumstances, our answer to the question referred to us must be in favour of the Income-tax Commissioner. Costs Rs. 250 to the Commissioner.

Sundaram Chetty, J.

Burn, J.

Sundaram Chetty, J.—I agree.

Burn, J.—I agree.

S. R. *Reference answered against the assessee.*

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1. (1930) 58 M. L. J. 602 (F. B.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE BURN.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

T. Namberumal Chetty & Sons .. *Respondents.*

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The Commissioner of Income-tax, Madras *v.* Namberumal Chetty & Sons.

Income-tax Act (XI of 1922), S. 32 (1)—Appeal to Assistant Commissioner—Increase of one item of income and reduction of another—Total assessable income reduced—Order, if one "enhancing the assessment"—Appeal.

When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer reduces the amount of income under one head but increases the amount under another, the net result, however, being a reduction both of the total income assessed and the tax, it is not an order "enhancing the assessment," though it may involve an enhancement of a particular item of income and no appeal lies to the Commissioner under S. 32 against that order.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as the "Act").

2. The petitioners who constitute a Hindu undivided family carry on business in timber and in the supply of sand in Madras, run a light railway at Trivellore and own a saw mill at Trichur in the Cochin State. Their main income is however from the large number of house properties which they own in Madras. They were assessed by the Income-tax Officer, Madras, II Circle (who is the assessing officer in this case) for the year 1930-31 as follows:—

		Rs.
(1) Property	..	46,092
(2) *Other sources*:		
Dividends, interest on debentures and remittances of profits from Trichur	..	2,206
		48,298
Less (3) Loss in business	..	7,144
Total income	..	41,154

The tax levied was Rs. 4,068-12-0.

3. The petitioners appealed to the Assistant Commissioner and claimed that the figure adopted under "Other sources" should

*O. P. No. 29 of 1932. 31st August, 1932.

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be reduced by Rs. 2,048. The Assistant Commissioner conceded this point.

4. In the course of the appeal however the Assistant Commissioner found that in computing the income under "Property" (item (1) in paragraph 2 above) the Income-tax Officer had allowed two deductions, *viz.*, (*a*) of Rs. 4,969 as collection charges, and (*b*) of Rs. 1,821 on account of irrecoverable arrears of rent. The Assistant Commissioner was doubtful whether these allowances had been correctly made and called upon the petitioners to furnish him with details of the allowances claimed. On a consideration of the materials placed before him he came to the conclusion that only a sum of Rs. 3,660 was admissible as collection charges and only a sum of Rs 1,478 on account of irrecoverable arrears of rent. He accordingly disallowed the difference of Rs. 1,652 (Rs. 1,309 *plus* Rs. 343) and raised the figure under "Property" to Rs. 47,744. He reduced the figure under "Other sources" by Rs. 2,048 (as explained in paragraph 3 above) and after setting off against the income a sum of Rs. 7,144 being the petitioners' loss in business (item 3 in paragraph 2 above) he determined the total income of the petitioners to be Rs. 40,758 and directed the recovery of tax amounting to Rs. 4,029-9-0. The net result of the Assistant Commissioner's order is that the total income of the petitioners as determined by the Income-tax Officer was reduced by Rs. 396 (Rs. 41,154 *minus* Rs. 40,758).

5. Against the Assistant Commissioner's order the petitioners submitted an application to me purporting to be an appeal under S. 32 (1) read with S. 31 (3) of the Act. I dismissed this application on the ground that there had been no enhancement and that no appeal lay to me.

6. The petitioners now require me to refer to the High Court various alleged questions of law said to arise out of the Assistant Commissioner's order. In my opinion the following question propounded by them is the only question of law arising out of the Assistant Commissioner's order and I refer it for the decision of their Lordships.

Question.—" When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer enhances the assessment under one head of income without causing an increase in the total income (by not including altogether income assessed under another head) does an appeal lie to the Commissioner under S 32 against that order?"

Section 32 (1) provides that an assessee objecting to an order enhancing his assessment under S. 31 (3) may appeal to the Commissioner. In this case the Assistant Commissioner reduced the amount of income under one head, *viz*, "Other sources" by Rs. 2,048 and increased the amount of income under another head,

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viz., "Property," by Rs. 1,652, the net result however being a reduction both o fthe total income and of the tax. The petitioners' contention is that so far as the Assistant Commissioner's findings in respect of their income from property are concerned there was an enhancement of their income from this source from Rs. 46,092 to Rs. 47,744, that this amounted to an enhancement of their assessment within the meaning of S. 31 (3) (notwithstanding the fact that there was actually a reduction in their assessment and in the tax due as a whole), and that they were therefore entitled to a right of appeal under S. 32 (1) of the Act. The enhancement referred to in Ss. 31 (3) and 32 (1) is an enhancement of the assessment; this, I submit, means an enhancement of the assessment as a whole and not an enhancement of a particular item of income in the assessment which does not result in the enhancement of the assessment as a whole. Income-tax is one tax and not a collection of taxes on different items of income and assessment to income-tax is one whole and not a group of assessments of different items of income. I am of opinion therefore that the question should be answered in the negative.

M. Patanjali Sastri for petitioner.

G. T. Ramanujachari for respondents (assessees).

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The question referred to us by the Commissioner of Income-tax is: Beasley, C.J.

"When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer enhances the assessment under one head of income without causing an increase in the total income (by not including altogether income assessed under another head) does an appeal lie to the Commissioner under S. 32 against that order?"

This is a novel point and the facts which give rise to the question are as follows:—The petitioners were assessed by the Income-tax Officer, Madras, II Circle, on a total income of Rs. 41,154 made up as follows:—(1) Property, Rs. 46,092 and (2) Other sources—dividends, interest on debentures and remittances of profits from Trichur, Rs. 2,206 *less* (3) loss in business, Rs. 7,144, making a total as before mentioned of Rs. 41,154. The tax levied was Rs. 4,068-12-0. The petitioners appealed to the Assistant Commissioner and claimed that the figure adopted by the Income-tax Officer under "Other sources" should be reduced by Rs. 2,048. This point the Assistant Commissioner conceded. In the course of the appeal, however, the Assistant Commissioner whilst conceding that point which of course reduced *pro tanto* total income assessable of the assessee

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was of the opinion that the Income-tax Officer had incorrectly allowed two deductions from the income arrived at under the first heading, namely, "Property". He went into the matter and computed the income of the assessee under the heading of property at Rs. 47,744 instead of Rs. 46,092, the computation of the Income-tax Officer. The result was that the total income assessed by the Income-tax Officer was reduced by this method by Rs. 396, as the total income was found to be Rs. 40,758 by the Assistant Commissioner. The petitioners here argue that they were entitled under S. 32 of the Indian Income-tax Act to prefer an appeal to the Commissioner, arguing that there had been an enhancement of the assessment. S. 32 (1) reads as follows:—

> "Any assessee objecting to an order passed by an Assistant Commissioner under S. 28 or to an order enhancing his assessment under sub-sec. (3) of S. 31, may appeal to the Commissioner within thirty days of the making of such order."

The argument of the assessee is that the computation of the income of an assessee arising under any or all of the various heads of income set out in the Act is itself an assessment and that therefore what the Assistant Commissioner did by increasing the amount under "Property" amounts to an enhancement of the assessment thereby giving the assessee the right of appeal to the Income-tax Commissioner. On the other hand, the Income-tax Commissioner contends that "assessment" in S. 32 means the assessment of the total income of the assessee. Unfortunately we gain no help by any definition of the word "assessment" in the Act because it is not therein defined. We have to see whether any other sections of the Act do give us any assistance. In my view, some assistance is to be gained from S. 23 (1) which provides that if the Income-tax Officer is satisfied that a return made under S. 22 is correct and complete, he shall assess the "total income" of the assessee, and shall determine the sum payable by him on the basis of such return. Then again sub-sec. (3) of the same section provides that where the assessee has not made a return the Income-tax Officer shall by an order in writing assess the "total income" of the assessee. There are some other sections which may possibly throw some light upon this question. S. 30 speaks of "the assessment" which seems, in my view, to mean that there is only one assessment and not several. Then we have to see what the assessee is entitled to do by way of an appeal to the

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Assistant Commissioner. Under S. 30, if he objects to the "amount" or "rate" at which he is assessed under S. 23 or S. 27, he may prefer an appeal to the Assistant Commissioner and again by the use of the word "amount" it seems to me to follow that what is meant is the total amount of the income and not the smaller amounts which go to make up the total. When he has got to the Assistant Commissioner, the Assistant Commissioner in disposing of the appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment or set it aside. Having done that it is only when he has enhanced the assessment that under S. 32 any appeal lies to the Income-tax Commissioner. If, on an appeal to the Assistant Commissioner, the Assistant Commissioner upholds *in toto* the assessment of the Income-tax Officer there has been no enhancement of the assessment nor any reduction of it, clearly in such a case as that no appeal lies to the Commissioner of Income-tax. *A fortiori*, if, on appeal to the Assistant Commissioner, he accedes to some of the contentions of the assessee and reduces the total amount of the assessment, no appeal lies to the Income-tax Commissioner. The question here is, whether, when the Assistant Commissioner does not enhance the total income assessable to income-tax but by means of reduction under one head and an increase under another head allows the Income-tax Officer's total assessment to remain the same or reduces it, merely by reason of the fact that the Assistant Commissioner has increased the income under one head, does an appeal lie to the Income-tax Commissioner? The Income-tax Commissioner in his Order of Reference is of the opinion that the enhancement referred to in Ss. 31 (3) and 32 (1) is an enhancement of the assessment and that it means an enhancement of the assessment as a whole and not an enhancement of a particular item of income in the assessment which does not result in the enhancement of the assessment as a whole. Income-tax, in his view, is one tax and not a collection of taxes on different items of income—that is obviously correct—and assessment to income-tax is one whole and not a group of assessments of different items of income. With that view I entirely agree. It cannot be correct that the computation of an income under each head set out in the Income-tax Act is itself an assessment. It is merely a computation of an item of income or class or classes of income which go to make the whole and,

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when the whole has been arrived at, there is an assessment. In my opinion, the view taken by the Income-tax Commissioner upon this point is the correct one and the answer to the question referred must be that an appeal in such a case does not lie.

Costs to the Commissioner of Income-tax Rs. 250.

Sundaram Chetty, J.—I agree.

Burn, J.—I agree.

S. R. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CORNISH.

Valliammal and others .. *Appellants** (*Respondents*)

v.

The Official Assignee of Madras. *Respondent* (*Applicant*).

Valliammal v. The Official Assignee of Madras.

Presidency Towns Insolvency Act (*III of* 1909), *Ss.* 108 *and* 109—*Administration of estates in insolvency—Applicability of provisions of the Act—Examination of parties under S.* 36—*Application against next-of-kin for delivery of account books—Maintainability—S.* 7—*Applicability—S* 58—*Scope—Burden of proof—R.* 117—*Validity of—Report of Official Assignee—Admissibility in evidence—S.* 8 (1)—*Applicability to orders in administration of estates of deceased debtors.*

In the administration of the estate of a deceased debtor under S. 108 of the Presidency Towns Insolvency Act, the Official Assignee examined the relatives of the deceased under S. 36 regarding the possession of certain account books of a business carried on by the deceased and, on their denial, applied to the Court and obtained a summary order directing delivery of the books. On appeal by those relatives,

Held, that (*i*) the sections of the Act, except those included in Part III, had no application to the administration of an estate in insolvency, unless there were strong reasons to the contrary;

(*ii*) S. 7 was only intended to apply to cases where there had been an adjudication in insolvency and not to cases of administration of estates in insolvency;

(*iii*) the Official Assignee had, therefore, no power to examine the parties under S. 36 or to apply under S. 7 for the delivery of the account books;

In re *Hewitt*, (1885) L. R. 15 Q. B. D. 159; *Sornammal* v. *Official Assignee, Madras*, (1914) 27 M.L.J. 66 and *D. J. Kolapore* v. *The Port Commissioners, Rangoon*, (1926) I. L. R. 4 Rang. 157 (F. B.), followed.

(*iv*) even if S. 7 had been applicable, the parties having been examined under S. 36 and having denied possession, the Official Assignee could not, without their consent, have proceeded with the application; his remedy was only by way of suit;

Official Assignee of Madras v. *Narasimha Mudaliar*, (1929) I. L. R. 52 Mad. 717: 57 M. L. J. 145 (F. B.), followed.

(*v*) such an application could, however, be made under S. 58 against persons alleged to be in possession of property admittedly belonging to the deceased debtor;

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*O. S. Appeals Nos. 23 and 24 of 1932. 11th May, 1932.

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(*vi*) (*obiter*) the next-of-kin and persons who have intermeddled with the estate of the deceased would be proper parties to an administration suit and the application could have been made against the appellants on that footing as well;

(*vii*) before an order for delivery can be made, the Official Assignee should make out a *prima facie* case that the other party had in their possession the property of which he sought delivery;

(*viii*) R. 117 of the Presidency Towns Insolvency Act offends against two important rules of evidence, namely, that testimony shall be on oath or by affirmation and that hearsay evidence shall be excluded. It is *ultra vires* and the report of the Official Assignee was by itself no evidence at all on such an application. The order made by the Court which was solely based on it could not be sustained;

(*ix*) though S. 8 which gives the right of appeal from an order in insolvency is not contained in Part III, S. 8 (1) applies by necessary implication to the orders of the Insolvency Judge in the administration of estates in insolvency and the order in the present case was appealable.

D. J. Kolapore v. *The Port Commissioners, Rangoon, ubi supra*, followed.

On appeal from the judgment of the Honourable Mr. Justice Stone, dated 29th February, 1932 and passed in the Insolvency Jurisdiction of the High Court in Application No. 19 of 1932 in Petition No. 197 of 1930.

S. Duraiswami Aiyar, K. Narasimha Aiyar and *P. Viswanatha Aiyar* for appellants.

V. C. Gopalaratnam for respondent.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—This is an appeal from an order of Stone, J., made in the Insolvency Court on the application of the Official Assignee that the appellants should be ordered to produce certain account books or be committed for contempt of Court. On the 29th February, 1932, Stone, J., passed the following order:—"Books to be delivered within two weeks." Against that order this appeal has been presented. It raises some interesting and important questions.

The proceeding in which the order under appeal was made was the administration by the Insolvency Court of the estate of one Gurunatha Mudaliar who died on the 5th June, 1930. His estate was insolvent but he had not before his death been adjudicated an insolvent. One of his creditors presented a petition to the Insolvency Court for the administration of the deceased debtor's estate under S. 108 of the Presidency Towns Insolvency Act and an order for the administration of that estate in insolvency was made after notice of the petition had been served upon the deceased's widow, the 1st appellant, who

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appeared by Mr. Varadaraja Mudaliar on the hearing of the petition but did not oppose it. The deceased debtor during his life-time carried on a timber business but he did not live at his place of business but lived at No. 52, Vellala Street, Purasawalkam, Madras, with his wife. He had a brother Ranganatha Mudaliar, who is the 2nd appellant. Immediately after the order for the administration of the estate in insolvency the Official Assignee took possession of a superstructure belonging to the deceased and some timber and some old pieces of furniture, and although the house and the business premises of the deceased were searched and an inventory was taken of all articles and documents, no account books and other documents or papers relating to the timber business were discovered, except some bill books for timber sold, and certain title deeds which the Official Assignee alleges to have been in the possession either of the 1st appellant or the 2nd appellant were not found. At this time there was in Madras Murugesa Mudaliar, the 3rd appellant, alleged to be a relation of the deceased debtor or the 1st appellant, who was assisting the 1st appellant in the administration of the estate and took some action with regard to the leasing of some properties. The Official Assignee's case is that the appellants have taken possession of the account books and other documents relating to the timber business carried on by the deceased and also the title deeds to some of the properties. The Official Assignee made a number of efforts to get the appellants before him for the purpose of examining them under S. 36 of the Presidency Towns Insolvency Act in order to ascertain whether they had the property in the shape of account books, documents and title deeds, etc., of the deceased debtor in their possession and eventually all the appellants were examined and all of them denied having in their possession those documents. Faced with these denials and being unable to get the documents the Official Assignee presented the application to the Court upon which the order appealed from was made. Affidavits in answer to the Official Assignee's application were filed by all the three appellants contradicting the Official Assignee's case. No evidence was taken by the learned Trial Judge although we are informed by Mr. V. C. Gopalaratnam appearing on behalf of the Official Assignee that he had his witnesses in Court. The learned Trial Judge upon the report of the Official Assignee on the one side and the affidavits

of the respondents on the other side passed the order that the books were to be delivered within two weeks. As learned counsel before us were unable to agree as to what happened in the Trial Court we have consulted Stone, J., who states that he made his order very quickly without considering any evidence other than the documentary evidence before him intending on the next occasion, namely at the end of the period prescribed in his order, to inquire into the question of the possession of the account books. We also ascertained from him that Mr. Narasimha Aiyar who was then appearing for the 1st appellant did not state that he wished to argue any question as to the jurisdiction of the Court to entertain the application although we accept Mr. Narasimha Aiyar's statement that he intended to take the point and had the necessary authorities to support his argument ready in Court and it was only the rapidity with which the order was made by our learned brother that prevented him taking this legal objection. It is conceded however that he informed our learned brother that the order made by him amounted really to a finding that either his client or the other appellants, or all of them acting together, were in possession of this property. Notwithstanding that, the order was passed.

The points taken here in appeal are: (1) that the Court had no jurisdiction to entertain a claim under S. 7 of the Act; (2) that even if it had, as the appellants had been examined under S. 36 and had denied possession of the books etc., the Official Assignee's remedy was by suit and not under S. 7; (3) that if the application was not one under S. 7 there is no other section in the Insolvency Act which entitles the Official Assignee to present it; and (4) that there was no evidence before Stone, J., upon which he could make the order that he did as the report of the Official Assignee cannot be evidence upon such an application and that therefore the denials of possession of the books by the appellants stood uncontradicted whereas the allegations made by the Official Assignee in his report remained unproved.

With regard to the first point the contention is that as this is an administration of the estate of a person dying insolvent under S. 108 the only provisions of the Act, except of course Part X in which S. 108 is, that apply are those contained in Part III. It is necessary to refer to S. 109. S. 109 (1) reads as follows:—

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"(1) Upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act, and (2) with the modification hereinafter mentioned, all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act."

It is argued that as S. 7 is in Part I of the Act its provisions do not apply to these administrations. In support of this argument reference was made to *Sornammal* v. *Official Assignee, Madras*[1]. It was there held that S. 7 is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. Sir Arnold White, C. J., held that the decision in In re *Hewitt*[2] governed the question. The facts in In re *Hewitt*[2] were that the deceased debtor's estate was being administered by the Bankruptcy Court under S. 125 of the Bankruptcy Act, 1883, the section corresponding to S. 108 of the Presidency Towns Insolvency Act. The Official Receiver applied to the County Court having jurisdiction in the matter of the administration for an order for the examination on oath before the Court of the widow and executrix of the deceased and the deceased's son upon the ground that they were capable of giving information respecting the deceased's property. It was ordered by the County Court that these persons should attend before the Court for examination on oath under S. 27 of the Bankruptcy Act, the section corresponding to S. 36 of the Presidency Towns Insolvency Act. This order they did not obey and an order for their committal for contempt was obtained. They appealed. Under the Bankruptcy Act of 1883 there is a provision similar to S. 109 (2) of the Presidency Towns Insolvency Act applying the provisions of Part III of the Bankruptcy Act to such administrations. That is S. 125 (5) to (8). S. 27 is not in Part III of the Bankruptcy Act of 1883 and it was held on appeal there was no power in cases of such administrations to apply the provisions of S. 27. Wills, J., who together with Cave, J., decided this matter at page 167 states thus:

"Now, by sub-section (6) of S. 125, the legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rule of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part III shall be applicable,

1. (1914) 27 M. L. J. 66. 2. (1885) L. R. 15 Q. B. D. 159.

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they must be considered to mean that other parts of the Act shall not be applicable."

This case has been referred to repeatedly in English decisions and in the course of the arguments in reported English cases and as an authority upon this point has never been questioned. Indeed it is probable that it was in consequence of this decision that in the Bankruptcy Act of 1914 an alteration was made in the law and the power to examine persons in such administrations was given to the Bankruptcy Court. No such alteration has been made to the Presidency Towns Insolvency Act. In re *Hewitt*[1] therefore strongly supports the appellants' contention that no sections of the Act which are not included in Part III have any application to administrations of estates under S. 108 unless there are very strong reasons for applying other sections. In re *Hewitt*[1] was considered by a Full Bench of the Rangoon High Court in *D. J. Kolapore* v. *The Port Commissioners, Rangoon*[2]. There the question to be considered was whether the provisions of S. 7 of the Act could be applied in the case of an administration under S. 108 and it was held by Rutledge, C. J. and Maung Ba, J., Heald, J., dissenting, that S. 7 is not a provision of the Act which, either expressly or by necessary implication, can be applied in such cases. Heald, J., took the view that the words "case of insolvency" in S. 7 of the Act are sufficiently wide to cover a case of administration in insolvency. Great reliance was placed by the majority of the Full Bench upon *Hewitt's* case[1] and it is very difficult to understand why Heald, J., did not consider that *Hewitt's* case[1] strongly supported the view expressed by the other two learned Judges. At page 167 he says:

"The position is therefore that there is one English ruling, namely, *Hewitt's* case[1], which suggests that the fact that a section which is sought to be applied to cases of administration in bankruptcy or insolvency falls outside Part III of the Act, precludes its application to such cases"

and

"With the greatest respect I find myself unable to apply that suggestion to the Indian Act."

I am quite unable to follow Heald, J.'s inability to apply *Hewitt's* case[1] to the Indian Act which is almost word for word the English Bankruptcy Act. As I have already stated, *Hewitt's* case[1] has, since its decision, been treated with the greatest respect both in the arguments at the Bar and in the judgments found in many English reported cases. In In the matter of

1. (1885) L. R. 15 Q. B. D. 159. 2. (1926) I. L. R. 4 Rang. 157 (F. B.).

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the Estate of *P. A. Mohamed Ganny*[1] Chari, J., held that Ss. 36, 55 and 56 of the Presidency Towns Insolvency Act are not applicable to administrations under S. 108 of the Act, S. 36 because of the authority of *Hewitt's* case[2] and the other two sections because of Ex parte *Official Receiver*, In re *Goulds*[3]. In the later case it was held that S. 47 of the Bankruptcy Act, 1883, corresponding to S. 55 of our Act, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy under S. 125 of the Act. The *ratio decidendi* of this case was that S. 125 of the Bankruptcy Act, 1883, corresponding to S. 108 of the Indian Act, is confined to the administration of the estate of a deceased debtor and does not include the administration of the property of other persons. The property having been voluntarily transferred by settlement ceased to be the property of the deceased debtor and hence it was not the property, the subject-matter of S. 125. *Hewitt's* case[2] therefore, defines the provisions of the English Bankruptcy Act applying to administrations under S. 125 of that Act to those in Part III of the Act. In re *Goulds*[3] goes further and decides that even some sections included in Part III of the Act have no application to such administrations because the Court has power to deal only with the property of the deceased debtor and not that of other persons. In my view, the decision in *D. J. Kolapore* v. *The Port Commissioners, Rangoon*[4] is correct. It appears to me that it was not intended by the use of the words "in any case of insolvency" in S. 7 of the Presidency Towns Insolvency Act to include the exercise of the powers of the Insolvency Court in cases of administration in insolvency such as this. The deceased debtor was not an adjudicated insolvent and, in my view, S. 7 was only intended to apply to cases where there had been an adjudication in insolvency. In my view, the Official Assignee had no power to examine the appellants under S. 36 of the Act and no power to take proceedings under S. 7. Even if he had possessed the latter power, he could not, without the consent of the appellants, have proceeded with the application having examined them under S. 36 and the possession of the documents, etc., having been denied by them. This right is

1. (1927) I. L. R. 5 Rang. 375.
2. (1885) L. R. 15 Q. B. D. 159.
3. (1887) L. R. 19 Q. B. D. 92.
4. (1926) I. L. R. 4 R. 157 (F. B.).

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clearly negatived by a Full Bench of this Court, of which I was a member, in *The Official Assignee of Madras* v. *Narasimha Mudaliar*[1], where it is pointed out that in such cases the Official Assignee's only remedy is to proceed by way of suit. This disposes of points 1 and 2.

I shall now proceed to deal with the third point taken by the appellants, namely, that if S. 7 is inapplicable, there is no other section in the Insolvency Act which entitles the Official Assignee to proceed with this application. It is argued that S. 58 of the Act does not give the Official Assignee this power because S. 58 (2) says:

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly."

This it is argued by the appellants limits the power of the Official Assignee to that possessed by a Receiver appointed under the Civil Procedure Code and that a Receiver thus appointed has no power to deal with persons who are not parties to the suit in which he has been appointed Receiver. Hence it is argued that, as a Receiver can only get the property of the estate which is in the hands of strangers to the suit by filing a suit against them, the Official Assignee is in no better position and his remedy is by way of a suit and not by such an application as this. In support of this argument the notes to O. 50, R. 16 of the Rules of the Supreme Court were referred to (page 899 of the Annual Practice, 1932). There it is stated:

"As against a stranger to the action who is in actual possession the appointment of the Receiver is of no effect."

In re *Crowther*, Ex parte *Ellis*[2] was also referred to. There it was held that a County Court Judge, sitting in bankruptcy, has no jurisdiction unless by consent, to order payment to the Official Receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered under S. 125 of the Bankruptcy Act of 1883. The County Court Judge made the order and the persons who had attached the debt appealed and Cave, J., in allowing the appeal, said:

1. (1929) I. L. R. 52 Mad. 717: 57 M. L. J. 145 (F. B.).
2. (1887) 20 Q. B. D. 38.

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"Section 125 of the Bankruptcy Act, 1883, has given power to the Court of Bankruptcy to administer the estate of a debtor who has died insolvent. Unless there is some provision to the contrary the Court in acting under this section must follow the practice of the Chancery Division of the High Court of Justice with regard to the administration of the estates of deceased persons In the High Court an application for an order such as that now appealed against would not be entertained without the consent of the person against whom the order was asked for."

I do not, however, think that this case goes as far as Mr. Duraiswami Aiyar for the appellants argues it does. When the facts of the case are examined it will be seen that what was decided that the Bankruptcy Court had no power to do was to entertain an application for the delivery up to the Official Receiver of money which the appellant not only claimed a right to possess but had got an order from the Court showing that he had made out a *prima facie* case for such a claim. That this is so will be seen from the argument of Mr. Herbert Reed who appeared for the appellant in that case. His first point was that the section under which the County Court Judge acted was not contained in Part III of the Act and therefore following In re *Hewitt*[1] the Court had no jurisdiction to act under that section. His second point was that the order affected not only the estate of the deceased debtor but also the property of another person, namely, the appellant, and in support of that argument he relied upon In re *Gould*[2]. This case, in my view, does not say that where a third person is in possession or is alleged to be in possession of property admittedly belonging to a deceased debtor such an application as this cannot be made although it must be conceded that the notes to O. 50, R. 16 of the Rules of the Supreme Court certainly do support Mr. Duraiswami Aiyar's argument. Although the Official Assignee is to have the same powers as a Receiver appointed under the Civil Procedure Code, S. 58 (1) says:

"The Official Assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery"

and sub-sec. (2) provides that on his application the Court will enforce his acquisition of that property or its retention. In my opinion, the words of the section are sufficiently wide to cover an application made to the Court for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. S. 59 entitles the Court to

1. (1885) L. R. 15 Q. B. D. 159. 2. (1887) L. R 19 Q. B. D. 92.

issue a search warrant and under it houses belonging to a person not the insolvent may be searched and the property of the insolvent discovered there seized. I cannot accede to the appellants' contention that where the Official Assignee has a well-founded belief that property of an insolvent or a deceased debtor lies in the house of a third person, obtains a search warrant from the Court, searches the house and is unable to discover that property because it is cleverly concealed by the occupier of the house, the Official Assignee is driven to file a suit against him instead of applying to the Court for directions or for such an order as was made in this case. Mr. Narasimha Aiyar for the 1st appellant argues that the Official Assignee's remedy must be by way of suit because non-compliance with the order such as was made in this case exposes his client to the risk of being committed for contempt whereas if a suit is filed against her and a decree is obtained she runs no such risk. The answer to that contention is that under O. 21, R. 31 of the Code of Civil Procedure such a decree could be executed by the detention in a civil prison of his client, the judgment-debtor, and or by the attachment of her property. Holding the view that the Official Assignee was entitled to make this application under S. 58 of the Act because the appellants are persons alleged to be in possession of property admittedly belonging to the deceased debtor, it is not necessary for me to consider the question as to whether or not he was entitled to do so because the appellants are to be regarded as parties to the suit. It was argued alternatively by Mr. Gopalaratnam for the Official Assignee that the appellants would be proper parties to an administration suit and therefore the Receiver would be entitled to make this application. The 1st appellant is the next-of-kin of the deceased and a next-of-kin is certainly a proper party to an administration suit. As regards the other appellants and indeed as regards the 1st appellant, the allegations are that they have intermeddled in the estate and if those allegations are true—it is not for us to enquire into them; that is a matter for the learned Trial Judge—then obviously they would be proper parties to the suit; but in my view it is unnecessary to go into this question.

There remains the fourth point argued by the appellants, namely, that there was no evidence before the learned Judge upon which he could make his order. With this contention I

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entirely agree. Before such an order as this could be made, the Official Assignee had to make out a *prima facie* case that the appellants had in their possession the property he sought to get delivery of. What was the sworn evidence put forward by the Official Assignee in support of his claim? Sworn evidence there was none, either oral or by affidavit. The whole case of the Official Assignee was set out in his report. Most of what is contained therein is derived from persons who did not give evidence. On the side of the appellants were the affidavits contradicting the Official Assignee's allegations. The question which arises here is, is the report of the Official Assignee in such a proceeding as this, *prima facie* evidence in support of his application? It was argued on behalf of the Official Assignee that R. 117 of the Presidency Towns Insolvency Act makes the Official Assignee's report *prima facie* evidence of the matter reported upon. That rule is as follows:—

> "Except where otherwise provided by the Act or these rules, evidence to be given by the Official Assignee may be given by his report to the Court and need not be upon affidavit; and such report shall be *prima facie* evidence of the matter reported upon."

The Act does not provide anywhere that the evidence on such an application as this to be given by the Official Assignee is not to be by his report nor must be upon affidavit. That rule is sufficiently wide even to enable the Official Assignee who has a money claim against strangers in an insolvency and against debtors to an insolvent's estate and in many other cases to rest his case upon his report only. This rule offends against two of the most important rules of evidence, namely, that testimony shall be on oath or by affirmation and that hearsay evidence shall be excluded. Under the English Bankruptcy Act the report of the Official Assignee is only receivable in evidence in the cases provided for in the Act and the rules, such as cases of composition or applications for discharge or where the conduct of the insolvent is in question, *i. e.*, failure to attend for examination, file his schedule or assist the Official Assignee and R. 190 of the Bombay Rules under the Act provides for the cases in which the Official Assignee's report is receivable by itself as evidence. If R. 117 is intended to allow the Official Assignee's report to be *prima facie* evidence in such a case as this, then I have no hesitation whatever in saying that the rule is *ultra vires*. In my opinion, the Official Assignee's report was not evidence at all. The learned Trial Judge therefore had no

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evidence before him upon which he could make the order. With all respect to the learned Trial Judge, I think he should have decided the question of possession first before making the order and after taking evidence. Indeed the only inference arising from his order is that he had decided that question and not left it for decision, as he intended to do, on the next occasion.

There is one other matter to be dealt with and that is the respondent's argument that, if the appellants' contention is right, namely, that the only sections of the Act applicable to such an administration are those contained in Part III, the appellants have no right of appeal because S. 8 is the section giving the right of appeal and that is not contained in Part III. Adopting the view of Wills, J., in In re *Hewitt*[1], unless there are strong reasons to the contrary, the words of S. 109 of our Act must mean that all the other parts of the Act except Part III shall not be applicable. But there are the strongest reasons to the contrary. No right of appeal is given by any of the other sections of the Act and it seems to me to be an amazing contention that, whereas in the case of an insolvent there is a right of appeal and the Court may review, rescind or vary any order made under its insolvency jurisdiction, where you have a deceased debtor no such right exists. Amongst other things, Part III deals with the proof of debts and when in an insolvency a creditor whose proof of debts has been rejected is entitled to appeal, why should the creditor whose proof is rejected merely because his debtor is dead be deprived of such a right? I am supported in the view I take about this matter by Rutledge, C. J., in *D. J. Kolapore* v. *The Port Commissioners, Rangoon*[2], who says that he would be prepared to hold that by necessary implication S. 8 (1) of the Act applies to orders of the Insolvency Judge arising in administration of the estates of deceased debtors. In my view, that contention fails.

In the result, the appeal must be allowed and the case remanded to the Insolvency Court where this application will be reheard in the light of the opinion expressed by this Court with regard to the evidence. With regard to costs, as a great deal of the appellants' argument was directed to the third point raised and it has been decided in favour of the respondent, I think the proper order will be to direct the costs of the appeal to abide the re-hearing of the Official Assignee's application.

1. (1885) L. R. 15 Q. B. D. 159. 2. (1926) I. L. R. 4 Rang. 157 (F. B.).

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Cornish, J.—I am of the same opinion and for the same reasons.

S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Palaniappan Chettiar and others .. *Petitioners** (*Defendants* 1 *to* 3)

v.

Settichi and others .. *Respondents* (*Plaintiff and Defendants* 5 *and* 6).

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Court Fees Act (VII of 1870 *as amended in Madras), Sch. II, Art.* 17-*A—Suit for declaration and appointment of Receiver—Conditional decree passed by Trial Court—Appeal by defendants—Declaration impugned in appeal—Alternative claim for sum of money—Declaration regarding prayer for appointment of Receiver—Court-fee payable.*

The plaintiff, a reversioner, sued for a declaration that a release deed executed by the 5th defendant, the widow, in favour of defendants 1 to 4 would not be binding on the ultimate reversioners and for the appointment of a Receiver to the estate of the last male-holder. The Trial Court passed a decree declaring that the ultimate reversioners would not be bound by the release deed but that they would be bound to pay defendants 1 to 4 a certain amount which had been spent to the benefit of the last male-holder's estate. The decree also stated that the plaintiff would be entitled to apply for the appointment of a Receiver in the event of the dismissal by the Court of another suit. Defendants 1 to 4 preferred an appeal and therein impugned the dec aratory decree and also contended that in any event the decree should be made conditional on payment by the ultimate reversioners of a larger amount than that awarded by the Trial Court.

Held, that the appellants were bound to pay court-fee under Art. 17-A of Sch. II of the Court Fees Act, as amended in Madras, only in respect of the declaration sought to be avoided and not also on the amount claimed by them in the alternative.

Sekharan v. *Eacharan Nair*, (1909) 20 M. L. J. 121 and *Pathumma Umma* v. *Aliyamakkanakath Mohideen*, A. I. R. 1928 Mad. 929, relied on.

Held, further, that the relief granted by the Trial Court in respect of the prayer for the appointment of a Receiver was purely declaratory and the appellants were bound to pay court-fee thereon only under Art. 17-A of Sch. II of the Act.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the Order of the District Court of Madura, dated 14th October, 1930, preferred against the decree of the Court of the District Munsif of Melur in O. S. No. 436 of 1927.

A. Nagaswami Aiyar for *P. N. Appuswami Aiyar* for petitioners.

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*C. R. P. No. 518 of 1931. 29th March, 1932.

V. Ramaswami Aiyar for *K. Rajah Aiyar* for respondents.

Palaniappan Chettiar *v.* Settichi.

The Court delivered the following

JUDGMENT.—In O. S. No. 436 of 1927 on the file of the District Munsif's Court of Melur the plaintiff sued for a declaration that a release deed executed by the widow, the 5th defendant, in favour of the reversioners-defendants 1 to 4, was not valid, for the appointment of a Receiver of the estate of the last male-holder inherited by his widow, the 5th defendant, and subsequently said to be in the possession of defendants 1 to 4, and also for directions to defendants 1 to 4 to rebuild a house, belonging to the estate, alleged to have been damaged or pulled down by defendants 1 to 4. The plaintiff is the daughter of the 5th defendant and is the sister of the 6th defendant. Defendants 1 to 4 are said to be the *gnatis* of the husband of the 5th defendant. The learned District Munsif passed a decree declaring that the ultimate reversioners would not be bound by the release deed executed by the 5th defendant in favour of defendants 1 to 4 but that they would be bound to pay the defendants 1 to 4 the sum of Rs. 1,188-4-0 which the defendants 1 to 4 were found to have spent to the benefit of the last male-holder's estate. The decree also stated that the plaintiff would be entitled to apply for the appointment of a Receiver in the event of the dismissal by the Court of Suit No. 627 of 1929 instituted by the 5th defendant against defendants 1 to 4 for certain reliefs concerning the release deed executed by her. Defendants 1 to 4 appealed to the District Court against the decree passed by the District Munsif. The question arose in the Appellate Court as to the proper court-fee payable on the Memorandum of Appeal. The learned District Judge, as I understand his order, found that in respect of the relief granted by the District Munsif concerning the appointment of a Receiver, a court-fee of Rs. 15 has to be paid under Art. 17-A of the second schedule of the Court Fees Act. As regards another prayer in the Appeal Memorandum, which the learned District Judge calls "the counter-claim of the appellants," he directed as follows:—"Appellants will pay court-fee on the amount awarded in the Lower Court (Rs. 1,188-4-0) and on the amount in excess claimed (Rs. 909-12-0)". Defendants 1 to 3—appellants in the Lower Appellate Court—have filed the present Revision Petition against the order passed by the District Judge.

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It was argued by the learned advocate for the petitioners that the learned District Judge was in error in directing the appellants to pay court-fee on the amount awarded to them by the Trial Court (Rs. 1,188-4-0), and on the amount in excess claimed by them in appeal—Rs. 909-12-0. As the learned District Judge has not fully discussed that aspect of the question, I am inclined to think that what he probably intended to order was that the appellants should pay court-fee only on the difference between the amount claimed by them in the first Court and the amount awarded to them by the decree of the District Munsif; but I must admit that on the face of the order of the learned District Judge, it would seem as if he directed the petitioners to pay the court-fee both on Rs. 1,188-4-0 and Rs. 909-12-0. In my opinion the learned District Judge was clearly in error in directing court-fee to be paid on both the amounts. I fail to see how defendants 1 to 4 could be directed to pay court-fee in respect of Rs. 1,188-4-0 for which they had already got a decree in the first Court. However, having regard to the view I take about that main declaration claimed by the plaintiff, I think that the defendants 1 to 4 need not pay court-fee on either of the two amounts mentioned in the order of the District Judge.

As already mentioned, the suit was one for a declaration that a release deed executed by the 5th defendant in favour of defendants 1 to 4 would not be binding on the ultimate reversioners. On such a plaint the court-fee payable is Rs. 15 under Art. 17 of the Court Fees Act, seeing that the suit was filed in the District Munsif's Court. No doubt the decree granted by the District Munsif gave a declaration (though a qualified one) in favour of the plaintiff. As I understand the Appeal Memorandum filed by defendants 1 to 4, they impugn the whole of the declaratory decree granted by the Trial Court. That being so, the court-fee payable in respect of this portion of the claim could be only that payable in respect of a declaratory relief, under Art. 17-A of the second schedule of the Court Fees Act. It is no doubt true that the defendants raised an alternative ground of appeal, namely, that even in case the Court should hold that the plaintiff would be entitled to a declaration, the declaration should not be entirely unconditional but should be one subject to a condition that the ultimate reversioners should pay the defendants a certain sum of money. In

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such a case I think the principle applicable is one similar to the rule laid down in *Sekharan* v. *Eacharan Nair*[1] and *Pathumma Umma* v. *Aliyammakkanakath Mohideen*[2]. Cases from Malabar have come before this Court where the plaintiff seeks relief in ejectment, and the defendant in possession not only raises pleas against the right of the plaintiff to eject but also claims compensation for improvements in case the Court should direct the ejectment. In such cases it has been held that when the defendant prefers an appeal against the decree in ejectment passed by the Trial Court which also directs the plaintiff to pay a certain amount of money as compensation for improvements or otherwise due to the defendant, the court-fee payable on the appeal should be calculated on the basis of the plaint in an ejectment suit "as the defendant in appeal has raised objection to the decree in ejectment altogether". "The circumstance that he also raised a ground claiming a larger amount for compensation due to him" has been held not to alter the real nature of the suit or the appeal. In fact in *Sekharan* v. *Eacharan Nair*[1] the defendant preferred an appeal and contended that the whole suit should be dismissed, though he also claimed a very large amount as due to him for value of improve-ents in case the decree in ejectment was ultimately confirm-ed. This Court has held that notwithstanding the subsidiary prayer, which will arise only in the alternative when his contention as regards the ejectment is overruled, the proper amount of court-fee is that leviable in a suit in ejectment and that the defendant-appellant need not pay any court-fee calculated on the value of the improvements relating to which he has taken a ground of appeal. When, however, the plaintiff who has obtained a decree in ejectment prefers an appeal questioning only the amount that has been directed to be paid by him to the defendant, then there are some cases which were cited to me which hold that in such cases the plaintiff, appellant, should value the appeal according to the amount to which he has raised a dispute. But the present case is one where defendants 1 to 4 oppose the grant of any declaratory decree at all; and that being so, I think the principle of the cases I have mentioned applies to the present case; and I am of opinion that the appellants 1 to 4 were bound to pay court-fee of Rs. 15 only under Art. 17-A of the second schedule of the Court Fees

1. (1909) 20 M. L. J. 121. 2. A. I. R. 1928 Mad. 929.

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Act, and that they need not pay any additional court-fee in respect of any portion of what the learned Judge calls "the counter-claim of the defendants". This disposes of the main question that was argued before me.

The learned advocate for the petitioners raised another question as to the amount of court-fee payable in respect of the relief by way of the appointment of a Receiver mentioned in the decree of the District Munsif. It was argued that the appointment of a Receiver is a consequential relief, and that the same need not be separately valued, and that the learned District Judge was in error in directing the appellants to pay court-fee of Rs. 15 in respect of that relief claimed by the defendants. On reading the decree of the Trial Court in this case, I find that the Court has not in fact directed the appointment of a Receiver. As I read the decree, the Court would seem to have in substance declared that a Receiver will be appointed in case another suit, No. 627 of 1929, which was pending between the defendants to this litigation, was decided in a particular way. I think that, having regard to the decree passed in this particular case and the allegations in the plaint, the learned District Judge was right in directing the appellant to pay court-fee of Rs 15 in respect of this relief. The decision of Venkatasubba Rao, J., in *Karuppanna Tevar* v. *Angammal*,[1] also (in my view) supports the decision of the learned District Judge on this point. No doubt it is possible, as the learned Judge observed in *Karuppanna Tevar* v. *Angammal*,[1] that in particular cases the appointment of a Receiver may be a consequential relief; but for disposing of the case before me I need not go into that question in detail, because, reading the decree passed by the District Munsif in the present case, there is, in substance, only a declaratory decree granted by him, so far as the prayer relating to the appointment of a Receiver is concerned. It therefore seems to me that the second contention raised by the learned advocate for the petitioners before me should fail and the court-fee of Rs. 15 fixed by the Lower Appellate Court with reference to that relief will stand.

The result then is that in respect of the first point argued before me, I modify the order passed by the learned District Judge, and I hold that the petitioners need not pay any court-fee in respect of any portion of the claim covered by what is called

1. (1926) 51 M. L. J. 67.

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"counter-claim" by the defendants, and that the court-fee of Rs. 15 paid under Art. 17-A of the second schedule of the Court Fees Act is enough for that purpose. With regard to the court-fee in respect of the relief claimed for the appointment of a Receiver, the Lower Appellate Court's order is hereby confirmed. In the circumstances I pass no order as to costs in the High Court.

It is mentioned to me that the appellants in the Lower Appellate Court have, in obedience to that Court's order, paid the court-fee as ordered by the learned District Judge. If they have already paid any excess court-fee, then they will be entitled to apply to that Court for a refund of the excess court-fee.

B. V. V. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Rajah of Kalahasti .. *Appellant* in all (Judgment-debtor in all)*

v.

P. Jagannadha Rayanimgar (deceased) and Raja Panaganti Parthasarathy Rayanimgar .. *Respondents in all (Decree-holder and his L. R.).*

The Rajah of Kalahasti *v.* Jagannadha Rayanimgar.

Civil Procedure Code (V of 1908), *Ss.* 107, 108 *and O* 22, *Rr.* 4 *and* 12 *—Rules of abatement—Applicability to appeals against orders in execution —Setting aside abatement—Excusing delay—Grounds—Confusion in state of law—Limitation Act,* 1908, *Arts.* 177 *and* 181.

The provisions of O. 22, Civil Procedure Code, relating to abatement of appeals in cases where legal representatives of deceased parties are not brought on record within the prescribed time, apply to appeals against orders made in execution proceedings as to other appeals.

Observations in *Sundayee Ammal* v. *Krishnan Chetti,* (1928) I. L. R. 51 Mad. 858: 55 M. L. J. 497, followed.

Hakim Syed Muhammad Taki v. *Rai Fateh Bahadur Singh,* (1929) I. L. R. 9 Pat. 372 (F. B.), not followed.

Where an application to have the abatement of an appeal against an order in execution set aside was filed at a very late stage and the delay was sought to be accounted for by the fact that the party and his advisers were induced to think, by reason of certain decisions of the Court, that it was unnecessary in such appeals to bring the legal representatives on record within the usual time,

Held, that under the circumstances the delay in applying to set aside the abatement should be excused.

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*A. A. Os. Nos. 62 to 64 and 67 of 1928. 19th February, 1932.

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Appeals against the orders of the District Court of Chittoor, dated the 27th day of July, 1927 and made in E. P. No. 12 of 1922 in O. S. No. 283 of 1907 on the file of the Court of the District Munsif of Tirupati in E. P. No. 13 of 1922 in O. S. No. 25 of 1905 on the file of the District Court, North Arcot, in E. P. No. 14 of 1922 in O. S. No. 42 of 1910 on the file of the Court of the Subordinate Judge of North Arcot and in E. P. No. 16 of 1922 in O. S. No. 22 of 1908 on the file of the District Court, North Arcot, respectively.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for appellant.

P. Venkataramana Rao and *V. S. Narasimhachari* for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—These four appeals are against orders for rateable distribution of the proceeds of a sale in E. P. No. 41 of 1916 on the file of the District Court. The appellant is the judgment-debtor. In Appeals Nos. 62, 64 and 67 of 1928 an objection has been raised by the decree-holder's representative that these appeals have abated. The decree-holder died in June, 1930 and no application to bring his legal representative on record as Respondent in these appeals was made until January of this year. To that objection the judgment-debtor replies that there is no rule of abatement in appeals against orders made in execution proceedings. It is not disputed that, in order that the judgment-debtor may proceed with these appeals, he must bring on record some representative of the decree-holder. But it is contended for him that, as the ordinary rule of abatement does not apply, he has a right to bring the legal representative on record at any time within three years under Art. 181 of the Limitation Act.

The rules regarding abatement as a penalty for not bringing the legal representative of a deceased party on record are to be found in O. 22 of the Code of Civil Procedure. But it is contended for the judgment-debtor that the rules in that Order do not apply to such appeals as these, because they are appeals against orders made in execution proceedings. The answer to the question whether that contention is correct depends upon the interpretation of R. 12 of that Order. The penalty of abatement in suits is imposed by Rr. 3 and 4 of O. 22. If

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the representative of a deceased plaintiff or defendant, where the suit cannot go on without such a representative being brought on record, is not brought on within the time fixed by the Limitation Act, *i. e.*, 90 days, the suit abates. Those rules do not directly apply to appeals, but Ss. 107 and 108 of the Code lay down that, subject to such conditions and limitations as may be prescribed, that is prescribed in Sch. I of the Code, an appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. In the application of that principle to appeals in the matters covered by O. 22 of the Code R. 11 of that Order provides "So far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent and the word 'suit' an appeal". The result of those provisions so far is clearly that the rules of abatement laid down in O. 22 for suits apply to appeals; and, if the matter ended there, it would be clear that they apply to all appeals. But it is contended that R. 12 of O. 22 has the effect of shutting out one class of appeals from these rules of abatement, namely, appeals against orders in execution proceedings. Literally I do not think it can be contended that R. 12 has that effect. The words of R. 12 are:

"Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

Literally it does not appear to me, reading the words in their plain, grammatical sense, that an appeal against an order made in execution proceedings is itself a proceeding in execution of a decree or order. However, it has been brought to our notice that there are decisions that R. 12 should be read in that extended sense. In *Mir Khan* v. *Sharful*[1] a single Judge of the Lahore High Court directly decided that to be so, though it may be remarked that he gave no reason for his decision. In *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[2] the question came before a Full Bench, and there the majority of the Judges decided that an appeal against an order made in execution proceedings fell within R. 12 of O. 22, and therefore the rules of abatement contained in that order did not apply to such an appeal. The reason given by the two learned Judges who formed the majority of the Bench was that an appeal

1. (1923) 74 I. C. 577. 2. (1929) I. L. R. 9 Pat. 372 (F.-B.).

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against such an order made in execution proceedings is itself a continuation of the execution proceedings, and therefore the rule excluding execution proceedings must apply also to such appeals. With great respect it appears to me that to say that an appeal against such an order is a continuation of execution proceedings is not a sufficient answer to the question. The question is, not whether such an appeal is a continuation of execution proceedings, but whether such an appeal is a proceeding in execution within the meaning of R. 12 of the Order. An appeal against a decree in an original suit is in a sense a continuation of the suit; but it is not the suit itself, nor is it a proceeding in the suit to which the rules of procedure for the suit necessarily apply. A proceeding in execution is a continuation of the suit; but it is not the suit itself, nor do the rules of procedure applicable to suits necessarily apply to execution proceedings. The third Judge of the Full Bench, Mr. Justice Das, came to the conclusion that R. 12 of O. 22 did not apply to appeals against orders made in execution proceedings, but that such appeals were subject to the same rules in regard to abatement as any other appeals; and with that opinion I respectfully agree. He pointed out that in the scheme of the Code we find procedure provided for original suits in Part I: in Part II we find procedure provided for execution proceedings: in another part of the Code, far removed, namely, Part VII, we find procedure laid down for appeals and not laid down for one class of appeals or some classes of appeals only but for all appeals. It has to be admitted that in no part of the Code other than O. 22 do we find any indication that appeals against orders made in execution proceedings are to be treated as a separate class of appeals, to which any separate and different rule of procedure applies from that which applies to other appeals. It happens that in this Court for the convenience of our work we call appeals against orders made in execution proceedings by a different name from appeals against decrees made in original suits, and they are usually allotted to a separate Bench for disposal. But that does not show that there is any essential difference in the nature of the appeals; nor do we apply any different procedure to them at any stage. In the mufassal there is not even this difference of nomenclature in regard to such appeals: appeals against orders made in execution proceedings and appeals against decrees made in original suits are all

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classified as one class of appeals and are registered under rules issued by this Court in one register and are treated in exactly the same way.

In this Court there has been no direct decision of a Bench on the question now raised. But in *Sundayee Ammal* v. *Krishnan Chetti*,[1] where it was decided that the legal representative of a deceased appellant can be brought on record in an appeal against an order made in execution proceedings for the purpose of continuing the appeal, the learned Judges remarked in regard to *Palaniappa Chettiar* v. *Valliammai Achi*[2], where it was decided that legal representatives could not be brought on record in original execution proceedings—a decision which has now been overruled by the Full Bench in *Venkatachalam Chetti* v. *Ramaswami Servai*[3]—that that case " did not relate to the case of an appeal against an order in execution, and there are obvious difficulties, *e g*., questions of limitation, the maintainability of successive applications, etc., which will arise if the ruling is applied to cases of appeal. We are not prepared to extend the application of the ruling to the present case and see no reason why the ordinary procedure relating to appeals when an appellant dies should not apply." These last words, which I have quoted, show that the learned Judges were clearly of opinion that there was no difference between appeals against orders made in execution and other appeals in this respect, which we are now considering. And perhaps more important than that is the long continued practice of this Court. It cannot be denied that until recent years, when we are told there has been some occasional variation in the matter, it has long been the practice of this Court to apply the rules of abatement to appeals against orders made in execution proceedings in exactly the same way as to other appeals. That shows that, although the question whether the rules of abatement apply to appeals against orders made in execution proceedings has not been the subject of any reported decision, a long succession of Judges have acted on the view that R. 12 of O. 22 does not apply to such appeals. If we were to accept the judgment-debtor's contention that R. 12 excludes such appeals from the ordinary rules

1. (1928) I. L. R. 51 Mad. 858: 55 M. L. J. 497.
2. (1926) I. L. R. 50 Mad. 1: 51 M. L. J. 745.
3. (1931) I. L. R. 55 Mad. 352: 62 M. L. J. 1 (F. B.).

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of abatement, then we should be making a very serious departure from the general practice of this Court.

No reason has been suggested in the arguments before us why any such distinction as is alleged should be made between appeals against orders in execution proceedings and other appeals in this matter. There are obviously good reasons why the rules of abatement should not apply to execution proceedings in the original or executing Court. It is unnecessary, if the decree-holder does not bring a legal representative promptly on the record in an execution proceeding, that he should be penalised for not doing so. The fact that he does not do so does not inconvenience the Court and is not likely to inconvenience anybody but himself. And it may be noticed that it would be useless in a great majority of cases to enforce any such rule of abatement in relation to execution petitions. If the Court were to say that, because the decree-holder had not brought a legal representative of a deceased judgment-debtor on record within a short period, his execution petition would abate and be dismissed, he could put in a new execution petition on the following day. On the other hand to enforce abatement in execution petitions might often have very harmful effects. The decree-holder who found that other decree-holders were competing with him for rateable distribution might find it convenient to allow his execution petition to abate in order that by that manœuvre he might get rid of the competition of the other decree-holders. Those are some among the reasons which will occur to any one why the rules of abatement are obviously inappropriate to execution petitions. But, when we turn to appeals against orders made in execution, why should not the ordinary rules of abatement apply to them as much as to any other appeals? It is just as inconvenient to the Court that an appeal against an order in an execution proceeding should be kept pending for years because the appellant does not choose to bring on record the necessary legal representative as it is that any other appeal should be kept pending in that way. It is just as unfair and inconvenient to a respondent, who has been successful in the Lower Court, or his representative in such an appeal that the appeal should be kept hanging over his head for years as it would be to a party who had been successful in the Lower Court in a matter raised in any other kind of appeal. The reasons which make it appropriate that rules of abatement

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should apply to appeals of any kind appear to me to make it equally appropriate that they should apply to appeals of the kind we are considering, that is appeals against orders made in execution proceedings. Indeed Mr. Govindaraghava Aiyar, who appears for the judgment-debtor in this case, has not been able to suggest any reason why the Legislature should have drawn the distinction which he has suggested, a very important and serious distinction, between appeals against orders in execution proceedings and other appeals. All that he was able to suggest was that this was the result of an implication in R. 12 of O. 22, which he suggested might have been introduced into that Order by inadvertence. R. 12 of that Order is not a rule which has been made by any High Court since the Code of 1908 came into force. It is a rule made by the Legislature when the Code was enacted, and I see no reason why we should attribute any carelessness to the Legislature in the matter. I distrust all arguments based on allegations that the Legislature has done its work with carelessness. Indeed we are not entitled to listen to any such suggestion unless we are driven to do so by some otherwise insurmountable difficulty in interpretation. For my own part I see no such implication as is suggested in the words of R. 12 of O. 22.

I may mention that Mr. Narasimhachari for the decree-holder drew our attention to R. 4 of O. 23 in which words exactly similar to those of R. 12 of O. 22 appear. R. 4 of O. 23 says:

"Nothing in this Order shall apply to any proceedings in execution of a decree or order,"

and R. 12 of O. 22 says:

"Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

The words "proceedings in execution of a decree or order" occur in both these rules in successive orders of the Code. I do not think it can be denied that there are some provisions in O. 23 which apply to all appeals, to appeals against orders made in execution proceedings as much as to other appeals. The very first provision in O. 23 is that a plaintiff may withdraw his suit. That undoubtedly applies to an appellant. But, if we were to give R. 4 of O. 23 the same interpretation as is suggested for R. 12 of O. 22 in regard to the words "any proceeding in execution of a decree or order," that provision

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regarding withdrawal would be shut out from all appeals against orders in execution. That comparison of the two rules in successive Orders may not lead us to any conclusive result; but it is at least interesting that the Legislature should have used the same expression in those two rules, and the judgment-debtor's contention in this case could not be upheld unless we supposed that expression had been used in two different ways in the two Orders, which to my mind is very unlikely.

In my opinion there is no doubt that the rules of abatement in O. 22 of the Code apply to appeals against orders made in execution proceedings as to other appeals. If this is so, these three appeals (C. M. As. Nos. 62, 64 and 67 of 1928) abated long ago. But applications have been made at a very late stage that the abatement may be set aside and that the delay in applying to set it aside may be excused. The grounds suggested for excusing the delay are that the party and his advisers were in doubt about the application of the rules of abatement to such appeals. There was some reason to think they did not apply, as it had been so decided by a Full Bench in *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[1]. And some confusion had arisen on the question of bringing in legal representatives in matters arising from execution generally in consequence of the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[2], which has now been overruled. It has also been mentioned to us that in C. M. P. No. 3223 of 1923[3] Mr. Justice Waller decided that the rules of abatement were not applicable to appeals against orders made in execution. Unfortunately no report of that case is available to us, and we are informed that the records of the case have been destroyed. But that too might have had some effect on the course adopted by the judgment-debtor in this case in inducing him to think that it was unnecessary to bring the decree-holder's representative on record within the usual time. In the circumstances I think we may excuse the delay in making the application to set aside the abatement of these appeals and set aside the abatement accordingly and bring the decree-holder's representative on record.

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1. (1929) I. L. R. 9 Pat. 372 (F. B.).
2. (1926) I. L. R. 50 Mad. 1: 51 M. L. J. 745.
3. 19 L. W. 43—Short Notes.

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On the merits it is urged in respect of these three appeals and also C. M. A. No. 63 of 1928, in which there is no question of abatement, that the petitions for rateable distribution, out of which the appeals arise, were time-barred when they were presented to the District Court. [His Lordship dealt with the plea of limitation and concluded:]

In my opinion therefore C. M. As. Nos. 62 and 67 of 1928 should be dismissed with costs; but C. M. As. Nos. 63 and 64 of 1928, relating to Execution Petitions 13 and 14 of 1922, respectively, should be remanded to the District Judge for fresh disposal. In C. M. As. Nos. 63 and 64 of 1928, as the judgment-debtor did not raise the question of limitation originally before the District Judge and in fact did not raise it until nearly three years after the petitions were filed, and as he has delayed the hearing of these appeals by the course he has taken in failing to bring the legal representative of the decree-holder on record, and as he has received indulgence from this Court in that matter, in my opinion he should pay the costs of both these appeals to the Respondent in any event.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree.

These miscellaneous appeals have been preferred by the Rajah of Kalahasti against the orders passed by the District Court of Chittoor by which the learned District Judge allowed the decree-holders who are respondents in these appeals and who had obtained decrees for money in various suits against the late Rajah of Kalahasti to share in the sale proceeds of certain properties belonging to the deceased judgment-debtor when the said properties were sold in execution of a decree for money obtained against the same judgment-debtor by the Mahant of Tirupati. The main contention of the appellant before us was that the execution petitions filed by the decree-holders—respondents—were barred by limitation, and that they were not entitled to a rateable distribution of the sale proceeds in the District Court.

The decree-holder in three of these connected appeals (C. M. As. Nos. 62, 64 and 67 of 1928) died in June, 1930 and applications to bring the legal representatives of the deceased decree-holder on record were made only in January of this year, that is long after the expiry of 90 days from the date of the death. On behalf of the legal representatives of the deceased decree-holder an objection was raised that these appeals have

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abated under the provisions of O. 22, Civil Procedure Code, as no applications to bring the legal representatives on record in these appeals were filed within 90 days from the date of the death of the decree-holder under Art. 177 of the first schedule of the Limitation Act.

On behalf of the appellant, it was argued that as the present appeals relate to proceedings in execution of decrees O. 22, Civil Procedure Code, was inapplicable to such proceedings, that no question of abatement arose in the cases, and that the appellant had a period of three years under Art. 181 of the LimitationAct within which he could apply to have the legal representatives of the deceased respondent brought on record, and as the present applications were filed within that period the appeals should be heard on the merits. Reliance was also placed by the learned advocate for the appellant on the recent decision of a Full Bench of this Court reported in *Venkatachalam Chetti* v. *Ramaswami Servai*[1] and on O. 22, R. 12, Civil Procedure Code.

The question was elaborately discussed before us, and I have come to the conclusion that the appellant's contention that Art. 181 applies to these cases is untenable, and I think that the provisions relating to abatement of appeals in cases where legal representatives of deceased parties are not brought on record within proper time apply to appeals preferred against decisions passed in execution of decrees. The decisions in *Venkatalakshmamma* v. *Seshagiri Rao*[2], *Ramanathan Chettiar* v. *Ramanathan Chettiar*[3], *Sundayee Ammal* v. *Krishnan Chetti*[4] and *Venkatachalam Chetti* v. *Ramaswami Servai*[1] are all distinguishable from the present case. In all those cases, the judgment-debtor or the decree-holder died when the execution petitions were pending in the executing Court; and having regard to the provisions of R. 12 of O. 22 which enacts that "nothing in Rr. 3, 4 and 8 of O. 22 shall apply to proceedings in execution of a decree or order," it was in effect held that the rules relating to abatement of suits if legal representatives of a deceased party to the suit had not been brought on record within the prescribed period did not apply to proceedings in execution of a decree pending in such Courts. None of these cases related to the death of a party pending an appeal. The various inconveniences and difficulties which would accrue if

1. (1931) I.L.R. 55 M. 352: 62 M.L.J. 1 (F.B.). 2. (1930) 60 M.L.J. 628.
3. (1928) 30 L. W. 995. 4. (1928) I.L.R. 51 Mad. 858: 55 M.L.J. 497.

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Ananta-krishna Aiyar, J.

the principle of abatement relating to suits were held applicable to such execution petitions were pointed out in those judgments, and it was also pointed out that the uniform practice of the Courts was also in favour of not applying such principle to such execution petitions. O. 22, R. 12, Civil Procedure Code, is only a statutory recognition of the said practice.

Mr. Govindaraghava Aiyar, the learned advocate for the appellant, however argued that after the enactment of R. 12 of O. 22 in the present Code of Civil Procedure it must be taken that the principle of abatement would not apply at all to proceedings in execution of a decree or order, and he argued that the present appeals were also proceedings in execution of a decree or order within the meaning of R. 12. He contended that the proceedings retained the character of "proceedings in execution of a decree" though they were carried to an appellate Court and that they did not lose that characteristic simply because they were pending in an appellate Court. He submitted that as an appeal is only a continuation of the suit, the present appeals are only a continuation of the proceedings in execution of the decrees, and he strongly relied on the decision of the Full Bench in the case reported in *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[1].

I am unable to agree with those contentions. Of course we are bound to give effect to the provisions of R. 12 of O. 22, Civil Procedure Code. But, in my opinion, the wordings of that rule are against the appellant's contention. As already remarked, R. 12 enacts that "nothing in rules 3, 4 and 8 of O. 22 shall apply to proceedings in execution of a decree or order". Are the proceedings in appeal before us "proceedings in execution of a decree or order" within the meaning of R. 12? I think not. I think that the expression "proceedings in execution of a decree" has a recognised and definite meaning as used in the Code of Civil Procedure. The scheme of the Civil Procedure Code is to treat separately of suits, execution proceedings and appeals; Part I of the Civil Procedure Code deals with "suits" in general, Part II with "execution" and Part VII with "appeals". A survey of the contents of the first schedule attached to the Code of Civil Procedure also confirms this view. O. 21 relates to "execution of decrees and orders".

1. (1929) I. L. R. 9 Pat. 372 (F. B.).

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The contention of the appellant is opposed to the literal and grammatical construction of R. 12. Rr. 3, 4 and 8 of O. 22 relate only to death of plaintiff or defendant pending a suit and to the insolvency of a plaintiff pending a suit. Those provisions are made inapplicable to proceedings in execution of a decree or order. The other rules of O. 22, Civil Procedure Code, are not made inapplicable. R. 11 implies that the provisions of the Order are applicable to appeals, since it proceeds to enact how the rules laid down by the Order are to be applied to appeals. R. 11 enacts that "in the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal." R. 11 therefore *prima facie* applies to all appeals, and appeals from orders relating to execution of decrees are not exempted from the operation of O. 22.

It was argued that an appeal is only a continuation of a suit, and that similarly an appeal from an order relating to execution is only a continuation of execution proceedings. Though in one sense it may be so, that is not the sense in which the Legislature has treated the matter in the Code of Civil Procedure. If an appeal is a continuation of a suit for all purposes of the Civil Procedure Code, what is the necessity for enacting Ss. 107 (2) and 108. The scheme of the Code is clear that "subject to such conditions and limitations as may be prescribed, the appellate Court shall have the same powers and shall perform as near as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein"—S. 107. *See also* S. 108. The circumstance that having regard to various considerations, the principle of abatement provided for by Rr. 3 and 4 of O. 22 has been made inapplicable to proceedings in execution of decrees does not, therefore, *prima facie* affect any question which has to be decided with reference to an appeal. An appeal may be against a decree passed in a suit, against an order passed in execution, or against an order from which an appeal is specifically provided for. When any question arises with reference to an appeal, the provisions of law relating to hearing and disposal of appeals have to be looked into for guidance, and followed. The question at that stage is not how the matter has come before the appellate Court, but as to what the

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powers and duties of an appellate Court are with reference to an appeal properly brought for its adjudication.

Reference was made by the learned advocate for the respondent to R. 4 of O. 23, where it is enacted that nothing in O. 23 shall apply to any "proceedings in execution of a decree or order," the words used being the same as in R. 12 of O. 22. The learned advocate for the appellant sought to make out that none of the provisions of O. 23 would apply to an appeal against an order in execution of a decree. I am not satisfied that he has made good his contention. In my opinion, the inference, if any, to be drawn by a reference to O. 23, is rather in favour of the view I am inclined to take regarding the procedure to be followed in such appeals.

As already mentioned, the inconveniences and difficulties in the way of applying the principle of abatement to execution proceedings pending in the execution Court do not exist with reference to appeals from orders relating to execution. The decree-holder's rights and privileges in the matter of filing and prosecuting execution petitions are quite different when his rights have been adjudicated upon by one Court but are pending before a Court of appeal. Considerations of convenience also seem to point out to the same inference as is suggested by the wordings of the provisions of the Code. Unless law is clear on the point to the contrary, it would *prima facie* be unreasonable to allow an appeal to be pending in an appellate Court for three years simply because one of the parties to the appeal is dead, and it is not a sufficient answer to be told that the appeal is from an order relating to execution of a decree. If anything, appeals from such orders should be disposed of as early as possible and more speedily than appeals from decrees in suits. If in appeals from suits legal representatives of deceased parties have to be brought on record within 90 days, why should a longer period be provided for such purpose in case of appeals from orders passed in execution of decrees. As far as I am able to gather, the practice of the Court (at any rate till very recently) has always been to apply the principle of abatement to all appeals, including appeals preferred against orders in execution of decrees. With reference to death of parties in an "original petition" pending investigation in the first Court, Ss. 141 and 146 have been applied in the matter of bringing legal representatives of deceased parties on record,

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and the principle of abatement has been applied to such cases—see *Rameshar Singh* v. *Bisheshar Singh*[1] (a case that arose under the corresponding provision—S. 647 of the Code of 1882)—but it is not necessary to pursue this aspect of the matter further at present.

The only decisions relating to appeals to which our attention was drawn in which the question is discussed are those reported in *Sundayee Ammal* v. *Krishnan Chetti*[2] and *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[3].

In *Sundayee Ammal* v. *Krishnan Chetti*[2] the learned Judges Wallace and Tiruvenkatachariar, JJ., had a case where in a Letters Patent Appeal against an order in execution of a decree of a Subordinate Court, the legal representative of the deceased appellant applied to be brought on record. The learned Judges held that the rule in *Palaniappa Chettiar* v. *Valliammai Achi*[4] did not apply to such a case, and made the following observations:—"The ruling in *Palaniappa Chettiar* v. *Valliammai Achi*[4] did not relate to the case of an appeal against an order in execution, and there are obvious difficulties, *e.g.*, questions of limitation, the maintainability of successive applications, etc., which will arise if the ruling is applied to cases of appeal. We are not prepared to extend the application of the ruling to the present case, and see no reason why the ordinary procedure relating to appeals when an appellant dies should not apply." Those observations directly apply to the present case. The question arose in an appeal from an order passed in execution of a decree, and the learned Judges held that "the ordinary procedure relating to appeals when an appellant dies should apply to an appeal from an order passed in execution of a decree". With respect, I entirely agree.

The decision in *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[3] was by a Bench of three learned Judges. Justice Das was of opinion that the words "proceedings in execution" occurring in R. 12 did not include proceedings in an appellate Court though the appeal was from an order passed in execution of a decree. Justice Kulwant Sahay was of a different opinion, and Justice Macpherson agreed with Justice

1. (1885) I. L. R. 7 All. 734 at 737.
2. (1928) I. L. R. 51 Mad. 858: 55 M. L. J. 497.
3. (1929) I. L. R. 9 Pat. 372 (F. B.).
4. (1926) I. L. R. 50 Mad. 1: 51 M. L. J. 745.

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Kulwant Sahay. For the reasons given by the learned Judge Das, J., and for the other reasons mentioned above, I think that there is no reason to differ from the statement of law made in *Sundayee Ammal* v. *Krishnan Chetti*[1] more especially as that is in accordance with the practice followed in this Court, (as I understand it) at any rate, till very recently.

The words used in O. 22, R. 12 and in O. 23, R. 4 are clear and specific. In these circumstances, as observed by Lord Halsbury, L. C., in *Commissioners for Special Purposes of Income-tax* v. *Pemsel*[2], "I do not think it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of Law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and, I think, any other view of the mode in which one must approach the interpretation of a Statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences".

In my opinion, the appellant's contention on this point should be overruled and three of these appeals should be held to have abated in the circumstances.

Applications have been filed to bring on record the legal representatives of the deceased respondent—decree-holder—in these appeals, and we are asked to excuse the delay in filing the applications. An affidavit explaining the delay has been filed, and we have also heard the learned advocates on this question. It was submitted that the practice of the Court of late has not been uniform, having regard to the decision of Waller, J., in C. M. P. No. 3223 of 1923, (19 L.W.—Short Notes, p. 43), and of the decision of the Patna High Court in *Hakim Syed Muhammad Taki* v. *Rai Fateh Bahadur Singh*[3]. We have not been able to get at the order of Waller, J., as the papers are said to have been destroyed. In the special circumstances, I think that we should excuse the delay in the present cases and direct that the legal representatives be brought on record as respondents in these three appeals.

No question of abatement arises in C. M. A. No. 63 of 1928.

1. (1928) I. L. R. 51 Mad. 858: 55 M. L. J. 497.
2. (1891) A. C. 531 at 549.
3. (1929) I. L. R. 9 Pat. 372 (F. B.).

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In all these four appeals, the appellant raised a question of limitation and contended that the execution petitions were barred by limitation when they were filed.

On the merits, C. M. As. Nos. 62 and 67 of 1928 have to be dismissed as no question of limitation was raised in the prior appeals—(C. M. As. Nos. 155 and 159 of 1925, which were dismissed by the High Court)—filed by the present appellant against the orders passed by the District Judge, in these cases, deciding the only point raised in these cases against the appellant. The appellant is not entitled to again raise the question of limitation at this stage of the proceedings. C. M. As. Nos. 62 and 67 of 1928 are accordingly dismissed with costs.

As regards C. M. As. Nos. 63 and 64, the question of limitation, though not raised in the first counter-petition filed by the appellant before the Lower Court, was raised by him in a supplemental counter filed by him in the Lower Court. The appellant did not however appear at the hearing before the District Judge, but it was mentioned that the hearing of the petitions was advanced without notice to the appellant, and that was the reason why he did not appear on the advanced date of hearing. But no such point was raised in the grounds of appeal to this Court. If the appellant's version be true, one should have expected the appellant to make proper representations to the learned District Judge on the date to which the petitions were originally posted for hearing, and have the mistake, if any, rectified. But on looking into the execution petitions filed by the decree-holder, we find that the question of limitation arises in these cases, and the decree-holder should—in the circumstances—be given an opportunity to show that the execution petitions were not barred by limitation. C. M. As. Nos. 63 and 64 of 1928 are therefore allowed and the execution petitions in these two cases are remanded to the Lower Court for fresh disposal, after giving the decree-holder an opportunity of showing, by reference to prior proceedings, that they were not barred by limitation when they were filed in Court.

In the circumstances, the appellant must pay the costs of the respondent in these appeals. The costs in the Lower Court will be provided for by the District Judge when fresh orders are passed.

B. V. V.

C. M. As. Nos. 62 *and* 67 *dismissed.*
C. M. As. Nos. 63 *and* 64 *remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

S. Srinivasa Aiyar and another .. *Appellants** (*Respondents*)

v.

Lakshmi Ammal *alias* Yogambal Ammal .. *Respondent* (*Petitioner*).

Srinivasa Aiyar *v.* Lakshmi Ammal.

Decree—Construction—Maintenance decree in favour of Hindu widow—Charge over specific items of family property—Arrears of maintenance—Remedy of decree-holder against family property not charged.

A decree for maintenance obtained by a Hindu widow against her husband's coparceners directed the latter to pay maintenance at a certain rate out of the assets of their joint family and further charged certain specific items of property with the maintenance. The payment of maintenance having fallen into arrears the widow applied by way of execution for attachment of the family house, an asset of the joint family but not an item over which the charge was created.

Held, that since the decree had provided for concurrent execution the application was legally sustainable, and it was not incumbent on the decree-holder to proceed against the security in the first instance.

Per *Venkatasubba Rao, J.*—If it is shown in such a case that the decree-holder's application is *mala fide*, the Court may, in the exercise of its discretion, refuse the application and compel her to pursue her remedy against the security.

Appeal against the order, dated 6th August, 1928, of the Court of the Subordinate Judge of Tinnevelly in R. E. P. No. 75 of 1928 in O. S. No. 2 of 1923 (A. S. No. 236 of 1925 on the file of the High Court).

N. A. Krishna Aiyar for appellants.

C. A. Seshagiri Sastri and *S. Panchapakesa Sastri* for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The Lower Court has made an order allowing execution and the defendants contend that that order is wrong, on the ground that the plaintiff is bound to proceed in the first instance against the properties charged under the decree. The decree sought to be executed is one for maintenance obtained by the plaintiff against her husband's coparceners. Paragraph 2 directs the defendants to pay the plaintiff maintenance at a certain rate *out of the assets of their joint family* and under paragraph 4 some specific items of property are charged with the maintenance awarded.

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*C. M. A. No. 89 of 1929. 18th August, 1932.

Srinivasa Aiyar *v.* Lakshmi Ammal.

Venkatasubba Rao, J.

The plaintiff applied in the Lower Court by way of execution, for attachment of the defendants' family house—an asset of their joint family but not an item over which the charge was created. The appellants' contention is, that the plaintiff should not be permitted, before exhausting her remedies against the security, to attach their other properties. The appeal raises the question whether in the case of maintenance decrees providing concurrent remedies, there is a rule of law which makes it incumbent on the plaintiff to proceed against the security in the first instance. The analogy of mortgage decrees which has been pressed on us is, in our opinion, inapplicable and no useful purpose will be served by our referring to the cases cited at the bar. Considerations that apply to decrees obtained by widows for maintenance are different from those that apply to mortgage decrees. The object of charging specific properties with the maintenance awarded to a widow is to safeguard her right and to make it prevail against persons claiming under subsequent transfers; while the decree confers on her this special right there is no reason to hold that her ordinary right is curtailed while that very decree in terms provides concurrent remedies. If the defendant succeeds in showing that the plaintiff's application is *mala fide* and oppressive and not made for a legitimate purpose, the Court may, in the exercise of its discretion, refuse the plaintiff's application and compel her to pursue her remedy against the security. But, in the present case, the facts show that far from the plaintiff's action being *mala fide*, the defendants who own extensive property, are withholding maintenance with the object of spiting the plaintiff.

We confirm the Lower Court's order and dismiss the appeal with costs.

Reilly, J.

Reilly, J.—I agree. If I may say so with respect, the decree made by the Subordinate Judge and amended by this Court on appeal does not appear to me to have been very happily worded. But I think there is no doubt that the Plaintiff (Respondent before us) is within her rights as given by that decree in applying for execution in respect of the particular arrears in question in this case against the assets of the joint family other than the charged property.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

Pillutla Venkatasubbamma and another .. *Appellants** (*2nd Defendant and 1st Defendant*)

v.

Gollapudi Ramanadhayya and others .. *Respondents in both* (*Plaintiffs*).

Venkatasubbamma *v.* Ramanadhayya.

Suit for partition between assignees of interest in a usufructuary mortgage of properties—Decree in favour of plaintiff—Finding that there was no benami transaction in favour of one of the defendants—Appeal in respect of that finding and final withdrawal—Memorandum of objections by plaintiff—Whether memorandum of objections could be urged despite withdrawal of appeal—O. 41, R. 22 (4), Civil Procedure Code—Defendant in such a partition suit whether liable to pay court-fees.

The plaintiff brought a suit against defendants 1 and 2 for partition and possession of his share in suit properties with mesne profits. The plaintiff and the 2nd defendant were assignees of the interest of a usufructuary mortgage of the suit properties. The Lower Court decreed the suit for the plaintiff but found that the 2nd defendant's husband in whose favour also the mortgage deed was executed was not a benamidar for 1st defendant as contended by plaintiff. The 1st defendant preferred an appeal in respect of that finding and the plaintiff filed a memorandum of objections against 2nd defendant with regard to mesne profits claimed by himself. The appeal itself having been withdrawn, the question arose as to whether the plaintiff could be permitted to urge his memorandum of objections. The 2nd defendant raised the contention that the appeal itself was invalid as it related only to a finding and since it was also withdrawn the memorandum of objections would have to be dropped also.

Held, that the suit itself having been for a partition, each sharer was in the position of a plaintiff and therefore the 1st defendant could have asked for a decree for her half share and as that was refused an appeal would lie and once there was a valid appeal the withdrawal of it did not prevent the hearing of the memorandum of objections under O. 41, R. 22 (4), Civil Procedure Code.

The defendant is merely to ask for his share and it is open to the Court to order the defendant's share also to be separated and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that stamp duty no other duty of court-fee is payable by the defendant in such a suit.

Hem Chandra Mahto v. *Prem Mahto*, (1925) 90 I. C. 739, approved.

Appeals against the decree of the Court of the Additional Subordinate Judge of Bapatla in O. S. No. 2 of 1925 (O. S. No. 23 of 1923, Sub-Court, Bapatla).

B. Somayya and *V. S. Narasimhachariar* for appellants.

M. Patanjali Sastri and *Kasturi Seshagiri Rao* for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—These are two cross-appeals against the decree in O. S. No. 2 of 1925 on the file of the Ramesam, J.

*Appeals Nos. 467 of 1925 and 67 of 1926. 8th March, 1932.

Venkatasubbamma v. Ramanadhayya.

Ramesam, J.

Additional Subordinate Judge's Court of Bapatla. The plaintiff in the suit was one Gollapudi Ramanadhayya, a retired Pleader of the District Court of Guntur. The suit is filed for partition of certain properties into two equal shares and for recovery of possession of one share with profits. There were four items of property which were the subject of the suit. They originally belonged to one P. Subramaniam, who was the adoptive father of Mangayya, the deceased husband of the 2nd defendant. Subramaniam executed a deed of usufructuary mortgage, dated 21st September, 1878, in favour of one Chimpiri for 50 years. Chimpiri assigned the mortgage bond by a document, dated 27th July, 1885, Ex. A, to one Krishnayya who assigned his interest by sale deed, dated 19th July, 1908, Ex. G, in favour of the plaintiff and Mangayya, the son of the original mortgagor. The plaintiff's case was that Mangayya, in Ex. G, was only a benamidar for the 1st defendant and the 1st defendant is therefore entitled to a half share of the mortgaged properties and the plaintiff to the other half, that afterwards the equity of redemption in items 1 and 2 of the mortgaged properties was purchased by the plaintiff himself and in the case of items 3 and 4 by the husband of the 1st defendant under sale deeds, Exs. C and I, dated 10th December, 1900 and 17th December, 1900, respectively. The Subordinate Judge gave a decree for partition of the suit properties and for delivery of half share to the plaintiff. He also found that Mangayya, in Ex. G, was not a benamidar for the 1st defendant. Appeal No. 467 of 1925 was filed by the 2nd defendant against the decree in favour of the plaintiff. In the appeal the only point raised related to Ex. C. The 2nd defendant contended that the sale deed, Ex. C, was benami for the 2nd defendant and this being found against the 2nd defendant, the point is repeated in the appeal. Appeal No. 67 of 1926 was filed by the 1st defendant in respect of the finding that Mangayya, in Ex. G, was not a benamidar for the 1st defendant. Taking up Appeal No. 467 of 1925 first, we see no reason to differ from the conclusion of the Lower Court. The consideration for Ex. C consists of Rs. 200 which the vendee agreed to pay in full satisfaction of the decree in O. S. No. 798 of 1889 obtained by Mahalakshmamma, wife of the vendor's maternal uncle against his father Subramaniam and Rs. 100, cash paid before the Sub-Registrar. One of the attestors to Ex. C was the plaintiff's

clerk and he paid the money before the Sub-Registrar. There is no reason why this payment before the Sub-Registrar should be discredited. As to the other payment of Rs. 200 to Mahalakshmamma, the matter is shrouded in some obscurity. The plaintiff is not able to say that he paid the amount direct to Mahalashmamma. He had been executing the decree on her behalf as a pleader and in that capacity he made the payment to himself. There are other dealings between Mahalakshmamma and himself. Mahalakshmamma died leaving her two daughters who were living in the plaintiff's house and the matter was ultimately adjusted between them and himself. One thing is certain, namely, no further execution of the decree was taken out against Mangayya, and this is all that the vendor can insist upon. The extinction of that decree is the consideration for the sale and as the decree was no more executed against him he got the consideration stipulated for. We find that Ex. C is supported by consideration. Appeal No. 467 of 1925 therefore fails and must be dismissed with costs.

We now come to Appeal No. 67 of 1926. This appeal was not pressed by the appellant and is withdrawn. It is therefore dismissed with costs of the 2nd respondent. But an important question arises in regard to this appeal. The plaintiff filed a memorandum of objections in relation to the mesne profits against the 2nd defendant and her tenants. This memorandum of objections was filed in Appeal No. 67 of 1926 and not in Appeal No. 467 of 1925. The reason that the plaintiff urges is that the tenants were not parties in Appeal No. 467 of 1925 and as he desired to have a decree for mesne profits both against the 2nd defendant and her tenants he could file the memorandum of objections only in Appeal No. 67 of 1926. To get rid of this memorandum of objections the 2nd defendant now contends that Appeal No. 67 of 1926 does not lie as it was only against a finding and as the appeal does not validly lie there can be no valid memorandum of objections in it. In reply it is urged by the plaintiff and by the 1st defendant that the suit itself being one for partition, each sharer was in the position of a plaintiff. The 1st defendant could have asked for a decree for her half share and as this was refused by the Lower Court an appeal lies. To the argument so stated, the 2nd defendant objects that no court-fee was paid by the 1st defendant in the Court below. The result of accepting the 2nd defendant's argument could

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be that as no court-fee was paid by the 1st defendant in support of her claim for a decree for half share, there is no valid claim in the Court below and therefore no valid appeal in this Court. The question therefore resolves itself into this, namely, when in a suit for partition one of the sharers asks for a decree for his share he should have paid court-fee to make his claim effective. If there is a valid appeal in this Court, the withdrawal of the appeal by the appellant does not prevent the hearing of the memorandum of objections under O. 41, R. 22, cl. (4), Civil Procedure Code. But if the appeal itself was not validly filed, then the memorandum of objections could not be heard. In *Shivmurteppa* v. *Virappa*[1] it was observed at page 130:

> "It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right."

With reference to an objection raised by the Subordinate Judge that the defendant will get his share and without any costs to him in court-fees, it was observed:

> "A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay court-fee on the value of his claim."

But that judgment does not make it clear when the court-fee can be demanded. That case arose before the present Stamp Act (II of 1899) was passed. The Act had been passed a month before the judgment of the High Court was delivered. But as no reference was made to the Act, the remarks of the High Court must have been made apart from the Stamp Act. In *Nawab Mir Sadrudin* v. *Nawab Nurudin*[2] the question was incidentally gone into by Sir Lawrence Jenkins, C. J., afterwards a Judge of the Privy Council. There the question arose in the stage of the execution after the passing of a decree. The learned Judge held that the order requiring the decree-holder to pay court-fees is erroneous when there is no such condition in the decree. In *Hem Chandra Mahto* v. *Prem Mahto*[3] the question was elaborately examined by Mullick, Offg. C. J., and Kulwant Sahay, J. (Patna). It was there held that the defendant is merely to ask for his share and it is then open to the Court to order the defendant's share also to be separated, and the right of the Crown to some revenue on the claim of the

1. (1899) I. L. R. 24 Bom. 128. 2. (1904) I. L. R. 29 Bom. 79.
3. (1925) 90 I. C. 739.

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defendant is satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendants in such a suit. We agree with the reasoning of Kulwant Sahay, J., in this judgment. The learned advocate for the 2nd defendant relied on the analogy of an administration suit and the decision in *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[1]. But, in our opinion, this has nothing to do with the matter and does not touch the reasoning in *Hemchandra Mahto* v. *Prem Mahto*[2]. The first of the two sentences from *Shivmurteppa* v. *Virappa*[3], already quoted by me, was quoted with approval in *Tukaram Mahadu* v. *Ramchandra Mahadu*[4]. But nothing is said about court-fees. In *Ramaswami Aiyar* v. *Rangaswami Aiyar*[5] it was held in an administration action that the Court is not entitled to demand from the creditors of the deceased court-fees on the value of their claims and S. 11 of the Court Fees Act should not be applied by analogy. We do not agree with the decision in *Peda Nagabhushanam* v. *Pitchayya*[6] in so far as it lays down that court-fees are to be paid. That decision might be distinguished on the ground that the decree provided that each of the defendants must pay the necessary court-fee before getting his share. We prefer the reasoning in the Patna decision already referred to. We are therefore of opinion that Appeal No. 67 of 1926 was validly filed and the withdrawal of the appeal by the appellant cannot affect the memorandum of objections. The memorandum of objections has therefore to be considered and disposed of.

It relates to (1) the plaintiff's claim for mesne profits for an extra year, and (2) the difference in the rate awarded by the Subordinate Judge and the rate now claimed. The Subordinate Judge has awarded mesne profits only for three years. By the time the suit was filed, namely, 19th February, 1923, mesne profits for four years had accrued due to the plaintiff, the Maghabaula Amavasya of the four years all falling within three years prior to the plaint. The plaintiff claims for each year Rs. 330-7-6 instead of Rs. 300 awarded by the Court below. Without going into further details we may at once say that the learned advocate for the respondent has rightly conceded these

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1. (1916) I. L. R. 44 Cal. 890. 2. (1925) 90 I. C. 739.
3. (1899) I. L. R. 24 B. 128. 4. (1925) I. L. R. 49 Bom. 672 at 683.
5. (1931) 61 M L. J. 933. 6. (1917) 6 L. W. 448.

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matters. Therefore it is enough to say that these two items are allowed in favour of the plaintiff.

The next item in the memorandum of objections relates to the plaintiff's claim for the subsequent profits. The Subordinate Judge left this for enquiry. But it appears that the various lease deeds filed in the case cover the subsequent years also, certainly up to March, 1928, when the usufructuary mortgage expired. Therefore there is no need for further enquiry. Here again we may observe that the learned advocate for the respondent has rightly conceded and therefore we hold that the plaintiff is entitled to mesne profits up to March, 1928. Therefore the plaintiff is entitled to subsequent profits at Rs. 344-8-0 per annum for five more years. According to the definition in the Civil Procedure Code mesne profits include interest. It is also so held in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*[1] and *Pankunni Menon* v. *Raman Menon*[2]. But we think in this case it is enough to award interest at the rate of 4 per cent. per annum from the date of accrual up to the date of payment.

There is only one other point which remains to be noticed. The suit was for partition on the ground that the plaintiff and the 1st defendant were joint usufructuary mortgagees of the suit land. A decree was given on that footing. The decree was passed in 1925. The appeals and the memorandum of objections were also filed in 1925. The mortgage itself expired in March, 1928. After that date the usufructuary mortgage ceased and the usufructuary mortgagee's right also is extinguished. The mortgagor who is now represented by the 2nd defendant would be entitled to the properties but for the fact that he in the meanwhile sold the properties. So far as items 1 and 2 are concerned, they were sold to the plaintiff under Ex. C and he is therefore entitled to possession as standing in the shoes of the mortgagor from March, 1928. The result is that the partition decree given by the Court below becomes unnecessary. It covers items 1, 2, 3 and 4 and now it is not necessary to divide these four items into two equal halves. The plaintiff becomes entitled to items 1 and 2 wholly and it is enough to vacate the Lower Court's decree and to modify it by saying that the plaintiff will be given delivery of possession of items 1 and 2

1. (1900) L. R. 27 I. A. 110: I. L. R. 27 Cal. 951: 10 M. L. J. 356 (P. C.).
2. (1931) 61 M. L. J. 596 (F. B.).

and he is also entitled to mesne profits from March, 1928, up to the date of delivery of possession or three years from to-day whichever happens earlier. These mesne profits will, in the first instance, be collected from defendants 3 to 9, who are the tenants of these two items. If any amount could not be recovered from the tenants, it can be recovered from the 2nd defendant. The subsequent profits from to-day will be recovered from the tenants. The necessity for the modification of the decree so far as the memorandum of objections is concerned arose (first) on account of the slips of the Subordinate Judge and secondly on account of the mortgage expiring while the appeal was pending and the appeal happened to remain undisposed of for five years. We do not therefore make any order as to costs of the memorandum of objections.

Venkatasubbamma *v.* Ramanadhayya.

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Madhavan Nair, J.—I agree and have nothing to add.

Madhavan Nair, J.

K. C. *Decree modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR GEORGE LOWNDES.

The Guntur Cotton, Jute and Paper Mills Company, Limited, Guntur .. *Appellants**

v.

Rao Bahadur Pydah Venkatachalapathi and another .. *Respondents.*

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Company—Directors—Alleged mismanagement—Loan at excessive rate of interest—Decrees allowed to become barred—Liability of directors.

A company being in urgent need of money, the necessary finance was provided by borrowing from the wives of the directors, and the money was utilised for the proper purposes of the company.

Held, that the directors were not liable to repay to the company the interest on the moneys thus borrowed, it not being shown that the rate of interest charged by the borrowers was, under the circumstances, excessive.

In order to render directors of a company personally liable for allowing decrees to become time-barred, the onus is on the company to establish (1) that the decretal amount could have been recovered from the judgment-debtors, and (2) that the failure to do this was due to the negligence of the defendants-directors.

Consolidated Appeals No. 32 of 1931 from two decrees of the High Court of Madras, dated the 3rd February, 1928,

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*P. C. Appeal No. 32 of 1931. 28th July, 1932.

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passed on appeal from a judgment and decree of the Subordinate Judge of Guntur.

The facts of the case are set out in the judgments of the High Court, Madras, reported in 1928 M. W. N. 481 and 115 Ind. Cas. 486 and are also concisely stated in the judgment of the Board.

Sir Herbert Cunliffe, K. C. and *Sir Thos. Strangman*, for appellants, during the course of the arguments, referred to the following authorities:—*Liquidators of Imperial Mercantile Credit Association* v. *Coleman*[1], *Imperial Mercantile Credit Association* v. *Coleman*[2], *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company*[3], *North-West Transportation Company* v. *Beatty*[4] and *Costa Rica Railway Company* v. *Forwood*[5].

Upjohn, K. C. and *Narasimham* for 1st respondent were not called upon.

28th July, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—These consolidated appeals arise out of prolonged disputes over the management of a Madras manufacturing company which seems to have had an unusually troubled existence. The company was promoted in 1904 by the two respondents and one Majeti Subba Rao, since deceased, who were its first secretaries, treasurers and *ex officio* directors. Heavy litigation with its subscribers in respect of unpaid calls characterised its early years, no less than 500 suits, so their Lordships are told, being necessitated. The capital subscribed was insufficient, and loans from the local bank were required for the erection of buildings and the equipment of the mill, which seems to have proceeded at a somewhat leisurely pace during the succeeding decade; and it was not until August, 1914, that it was ready to commence the manufacture of jute bags for which it was intended. By that time it appears to have been heavily indebted. The bank refused further advances and the necessary finance was provided by borrowing from the wives of the respondents who were ladies of means. For these loans, which began in 1913, promissory notes were given to the ladies. Subsequently a mortgage of the mill properties was

1. (1873) L. R. 6 H. L. 189.
2. (1871) 6 Ch. App. 558.
3. (1914) 2 Ch. 488.
4. (1887) 12 A. C. 589.
5. (1901) 1 Ch. 746.

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executed in favour of Sathirazu, the wife of the first respondent, whose advances amounted to Rs. 78,000. This mortgage, which is dated the 2nd June, 1918, is the focus of one of the principal disputes in the present appeals.

In 1915 the tenure of the respondents as secretaries and treasurers of the company was enlarged to a life appointment and from that time onward there seems to have been open war between them and the shareholders. The auditor reported mismanagement; the balance sheet for 1915 was thrown out at the general meeting; a request to call an extraordinary meeting was refused; criminal proceedings followed; rival meetings were held at which rival directors were elected. Eventually the appointment of the respondents was cancelled as from the 31st March, 1918, but no new appointment was actually made until the 19th December following and the respondents continued as *de facto* managers until that date.

On the 30th April, 1919, the suit out of which these appeals arose was instituted in the District Court of Guntur, in the name of the company, by the new secretaries and treasurers, and further litigation is, so their Lordships are told, still pending in India. The principal reliefs prayed in the suit were a declaration that the respondents were no longer entitled to take part in the management of the company, an injunction restraining them from so doing, an account of their stewardship from 1904, and an indemnity against loss suffered by the company in respect of "acts of misappropriation and fraud and other acts of non-feasance, misfeasance and malfeasance" during the period of their management.

The suit was defended by both the respondents. Issues were raised, and after a trial which extended to some 60 hearings, and has produced a record of over a thousand pages, only a fraction of which has been found material in the present appeals, the learned District Judge on the 24th April, 1922, delivered his judgment and passed a preliminary decree. By this the declaration, injunction and account prayed for were granted, and the respondents were ordered to pay to the company Rs. 18,000 by way of damages in respect of a certain lease of the mill premises which will be referred to in greater detail hereafter, together with a small sum for rent (not now in dispute) and Rs. 7,039-10-8 in respect of commission received by them to which they were held to be not entitled. The first

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respondent was also ordered to refund to the company a sum of Rs. 2,200-4-3 received by him under a subsequent lease by way of secret profit.

The account was ordered to be taken by a commissioner, and was to include the amount payable to the plaintiff company in respect of any of certain decrees which he should find to have been allowed to have become time-barred by the neglect or collusive act of the respondents.

Against this decree both the company and the first respondent appealed to the High Court. In the meantime the comm ssioner made two reports which were considered by the successór of the Trial Judge and on the 4th April, 1924, he made a final decree in the case embodying the material terms of the preliminary decree and, as a result of the commissioner's reports, ordered the respondents to pay further sums of Rs. 46,011-10-0 in respect of interest debited to the company on the loans before referred to, and Rs. 4,430-9-7 on account of barred decrees. The respondents were also ordered to pay the costs.

Further appeals against the final decree were lodged by the company and the first respondent and all the four appeals were heard together. Judgment was delivered on the 3rd February, 1928, with the result that the company's appeals were dismissed, and on the first respondent's appeals both the preliminary and final decree of the District Court were varied. The Rs. 18,000 damages were reduced to Rs. 12,370-8-0; the Rs. 7,039-10-8 for commission, and the Rs. 46,011-10-0 in respect of interest on loans were eliminated; the Rs. 4,430-9-7 on account of barred decrees was reduced to Rs. 484-5-4, and the costs were to a large extent laid upon the present appellants.

The company now appeals to His Majesty in Council, complaining not only of these variations but seeking also wider relief than was accorded to it by the District Judge. On the other side only the first respondent (who was the second defendant in the suit) has been represented before the Board.

Their Lordships have not thought it necessary in this case to hear counsel for the first respondent as they are satisfied that the conclusions come to by the learned Judges of the High Court cannot be attacked by the appellant company. They will give their reasons briefly under the four heads of complaint which have been argued before them.

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On the first head the main contentions of the company were concerned with the mortgage in favour of Sathirazu, the wife of the first respondent. It was executed, as already stated, on the 2nd January, 1918, and was for Rs. 1,23,354-11-9 which was said to be the amount due for principal and interest in respect of the ladies' advances up to the 2nd January, 1918. Inasmuch as the mortgagee was not made a party to the suit it is manifest that the company's contention that the Courts in India should have held the mortgage to be void cannot be supported. There is apparently still pending in the local Courts a suit by the mortgagee for the enforcement of her security in which all questions as to the validity of the transactions can be decided between the proper parties.

But it is further contended that a sum of Rs. 74,000 which was repaid to Sathirazu by the respondents, in part after the date when their activities as secretaries and treasurers should have ceased, ought to have been ordered to be refunded by them. Both the District Judge and the High Court refused to accede to this contention and their Lordships have no doubt they were right. It is not now at all events disputed that a sum of Rs. 78,000 was in fact advanced by the lady and was utilised for the proper purposes of the company. There is no ground therefore upon which the repayment of the smaller sum out of the funds of the company can be impugned.

There remains under this head only the question of the Rs. 46,011-10-0 in respect of interest which the District Judge ordered to be repaid but which the High Court disallowed. The ground of this claim was that the rate of interest on Sathirazu's advances to which the respondents had committed the company was excessive. It is, their Lordships think, a sufficient answer to this contention to say that no attempt was made on behalf of the company to prove that the money, of which it is clear the company was in urgent need, could have been raised at any lower rate. It was suggested in the Trial Court that the real lenders were the respondents, but this was not established, and no charge of this nature has been made before the Board.

Turning next to the question of the leases, the matter stands as follows. The mill as already stated was completed in 1914. The respondents however soon found that they could not work it on the company's account at a profit and a system of so-called "leasing" was adopted. The method as explained

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to their Lordships was to make a contract with the "lessee" for the supply of a certain quantity of jute which the company was to manufacture into bags for him at a fixed rate, the company's profit on the transaction being the difference between the actual cost to them of the process of manufacture and the rate agreed on.

The lease in 1915 was advertised and the tender of one Nalam was accepted. He agreed to supply 4,000 *puttis* of jute and to pay Rs. 22 per *putti* for the cost of manufacture (a *putti* being the equivalent of 500 lbs.), and at this price the company apparently made a profit. Subsequently to the acceptance of his tender a partnership was formed under which Nalam agreed to share the profits of his contract with one Chennaya and Satyanarayanamurthy, the first respondent's son, whose share was to be 6-annas in the rupee. The appellant company charged that the son's name was merely a cloak for the two respondents who were thus secret sharers, and that the lease was a fraud on the company. The Trial Judge held this charge to be unsustained. He was, however, of opinion that the respondents could and ought to have secured the rate of Rs. 26-8-0 per *putti* instead of Rs. 22, and he held them responsible for the difference of Rs. 4-8-0 in respect of the 4,000 *puttis*, *i. e.*, the sum of Rs. 18,000 which was included in the preliminary decree.

In the High Court Wallace, J., agreed with the Lower Court that there was no evidence that the respondents were interested in or had made a secret profit from the lease, and he thought that there was no evidence to support the higher rate of Rs. 26-8-0. He also pointed out that in any case the Rs. 18,000 awarded was wrong as in fact the whole of the 4,000 *puttis* had not been manufactured but only 2,749. His colleague, Srinivasa Aiyangar, J., disagreed on the main question of liability. The reasoning of his judgment on this point is not very clear, but he seems to have thought that there was evidence to support both the higher rate of Rs. 26-8-0 and a secret interest of at all events the first respondent in the lease. He therefore affirmed the finding of the Trial Judge as to the liability of the respondents for the difference of Rs. 4-8-0 per *putti*, but he agreed with his learned colleague that it could only be charged upon the 2,749 *puttis* actually manufactured. In the result, by the decree of the High Court the Rs. 18,000 was as above stated

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reduced to Rs. 12,370-8-0. Their Lordships are told that a further appeal upon this point under the provisions of the Letters Patent, based upon the difference of opinion between the learned Judges, is still pending in the High Court, but there is no appeal by the first respondent before this Board and the decree for Rs. 12,370-8-0, so far as the Board is concerned, stands.

The appellant company now seeks to restore the figure of Rs. 18,000 awarded by the Trial Judge, but their Lordships have some difficulty in understanding upon what this contention is based. Assuming in the company's favour that there was sufficient evidence to support the higher rate of Rs. 26-8-0 and that the respondents were guilty of a breach of their duty to the company in accepting the Rs. 22, it clearly does not follow that they were responsible for any loss in respect of the unmanufactured *puttis*. The raw material for the balance was not supplied by the lessee, and there is no evidence that this was in any way the fault of the respondents, or that damages could have been recovered from the lessee. They think therefore that this claim must necessarily fail.

The only other question raised under this head was as to the subsequent lease for 1918-1919. It was put up to auction and knocked down to one Varadaraghaviah, the brother of the second respondent. It is the company's case that this auction was collusive, but both Courts in India have negatived the contention and this point has not been pressed. It was, however, concurrently found that after the auction the first respondent was given a 2-anna share in the proceeds of the contract which worked out at Rs. 2,200-4-3 and for this sum he has been made liable. He has not appealed and his liability stands. The contention of the company before their Lordships is that he should have been charged with the whole profits of the partnership and not merely with his individual share. In the Trial Court this claim was supported by reference to the case of *Liquidators of Imperial Mercantile Credit Association* v. *Coleman*[1]. The contention does not appear to have been pressed in the High Court, and under the circumstances their Lordships think it sufficient to say that the case in question was rightly distinguished by the Trial Judge, and that upon the facts proved

1. (1873) L. R. 6 H. L. 189.

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the liability of the first respondent could not be held to extend beyond his 2-anna share.

The third head of complaint concerns the commission. Under the Articles of Association of the company the respondents as secretaries and treasurers were jointly entitled to a commission of 12 per cent. upon the profits of the company, and they drew on this account during the years 1915-1917 sums amounting to Rs. 7,039-10-8. At the trial it seems to have been contended that owing to their mismanagement of the business of the company they were not entitled to any remuneration and that this sum should be refunded. To this contention the Trial Judge acceded, basing his decision upon S. 220 of the Indian Contract Act. This item was struck out of the decree by the High Court. It was pointed out in the judgment that the only claim made in the plaint was that the respondents were not entitled to any commission after the 31st March, 1918, when their appointment as secretaries and treasurers was said to have been determined, and that therefore the company's contention on this head was not open. The learned Judges were also of opinion that it had not been proved that the respondents had been guilty of any misconduct during the years in question. Their Lordships see no reason to differ from the conclusions so come to, and they think that this item was rightly disallowed.

It only remains to deal with the claim in regard to the time-barred decrees. Of these a detailed list of 144 decrees was laid before the Commissioner upon which he found the respondent liable on the ground of negligence for Rs. 9,897-15-6 in respect of 39 decrees. This was reduced by the District Judge to Rs. 4,430-9-7 upon 16 decrees. The High Court allowed only Rs. 484-5-4. Under this head the claim of the appellant company before the Board was for the restoration of the amount allowed by the Commissioner, but the argument was in effect confined to certain items in respect of which it was said that the respondents had admitted liability before the District Judge.

There was their Lordships think no possible ground upon which the Commissioner's figure could be supported. In order to debit the respondents with the unrealised amounts of these decrees it was necessary for the appellant company to show that the amount in each case could have been recovered from the decretal debtors and that the failure to do this was due to the

negligence of the respondents, but no attempt seems to have been made to establish either branch of the charge.

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Their Lordships are also unable to accede to the argument as to the so-called admissions. The District Judge no doubt says in his judgment that as to 13 items of which the numbers are specified "the defendants' pleader states that he has no objection," and that item 79 was also given up on a scrutiny of the records. In the judgment of the High Court, however, only 2 of the 13 items and item 79 are said not to have been contested. Their Lordships are asked to hold on the state of the record that the learned Judges of the High Court had overlooked the admission as to the other 11 items. This in the absence of clear evidence on the point their Lordships are unable to do. It is quite possible that the admission was disputed in the High Court or it may have been allowed to be withdrawn. If such a slip had been made the attention of the Court should have been called to it in India. So far from this having been done, their Lordships find that in the company's petitions for leave to appeal to His Majesty in Council no suggestion that anything of the kind had occurred, though other grounds of complaint are set out in great detail.

For the reasons given their Lordships are of opinion that the appeals must fail and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas, Grant & Dold.*

Solicitors for 1st respondent: *Barrow, Rogers and Nevill.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD SALVESEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Hansraj Gupta and others .. *Appellants**

v.

N. P. Asthana and others .. *Respondents.*

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Hansraj Gupta *v.* Asthana.

Companies Act (VII of 1913), *S.* 156—*Contributory—Liability of—Nature of—Contract for taking shares illegal—Applicant placed on the register—Effect of.*

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*P. C. Appeal No. 127 of 1930. 28th July, 1932.
Allahabad Appeal No. 1 of 1930.

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Where, at the commencement of the winding up, the appellant was and had been in fact for over three years entered on the register of shareholders as the holder of shares, with his full knowledge and consent, his liability under S. 156 of the Indian Companies Act in respect of the shares is absolute and flows from the fact of his being in the register in respect of those shares. Even if he took the shares under a contract with the Company which is found to be illegal and void as offending against the provision of S. 105 of the Companies Act, that does not affect his liability to contribute on the winding up. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding up his liability in respect of the shares arises *ex lege* and not *ex contractu*.

Appeal No. 127 of 1930 from the judgment of the High Court of Allahabad, reported in In re *Dehra Dun-Mussoorie Electric Tramway Co., Ltd.*, (1930) I. L. R. 52 All. 406.

L. Cohen, K. C. and *W. Wallach* for appellants.

D. N. Pritt, K. C. and *A. R. Thomas* for respondents.

28th July, 1932. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—In this appeal, and in another appeal (No. 86 of 1930), in which the same parties are concerned, the relevant facts cover much common ground, and they were accordingly heard together.

Lala Raghu Mal (who will be referred to as the testator) was a shareholder in a company (herein called the company) named the Dehra Dun-Mussoorie Electric Tramway Company, Limited, which was incorporated under the Indian Companies Act, 1913, on the 23rd August, 1921. He carried on business under the style of Madharam-Hardeo Das at Calcutta and under the style of Madho Ram-Bud Singh at Delhi.

On the 23rd February, 1922, he entered into a contract in writing with the company (modified in some respects at a later date) by which he agreed to supply large quantities of tramway construction material to the company. Clause 16 of this contract was in the following terms:—

"The Company shall pay to the Contractors by way of advance when the Contractors have placed the orders in accordance with the terms of paragraph No. 6 above, twenty-five per cent. of the value of such materials for which firm orders shall have been placed as aforesaid by the Contractors. Any amount of advance or advances so paid shall be deducted from the final payments for the respective materials as in paragraph No. 13 above."

On the same date a sum of Rs. 27,000 was paid to the testator, and a letter was written to him, signed by one Beltie Shah, as managing agent on behalf of the company, in which

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it was stated that

"We have to-day paid you Rs. 27,000 (rupees twenty-seven thousand) by way of an advance and this amount will be deducted from your bill for the second shipment. Your receipt for the above amount will be understood to have been given on acceptance of these terms."

A receipt, dated the 23rd February, 1922, was given on behalf of the testator for this sum of Rs. 27,000, "being the amount of advance for the order for rails placed with us by them in terms of their letter . . . dated the 23rd February, 1922. This amount is to be adjusted hereafter from our bills for supply of rails."

Some correspondence took place later in the year between the parties relative to this sum, but the contract between the parties in relation thereto must, their Lordships think, be sought only in the document of the 23rd February, 1922.

On the 12th August, 1922, a conversation took place between the testator and Beltie Shah, as a result of which the testator signed or authorised the signature on his behalf of two forms (dated the 12th August, 1922) applying for further shares in the company. By one form he applied for 10,000 ordinary shares of Rs. 10 each; by the other he applied for 250 preference shares of Rs. 100 each. It will be sufficient to set out the terms of the application form for the ordinary shares. It was addressed to the directors of the company and ran thus:

"Having paid to the Company's agents, the Messrs. T. Beltie Shah Gilani, the sum of Rupee one per share on ten thousand ordinary shares of Rs. 10 each in the above Company, I request you to allot me that number of shares, upon the terms of the Company's prospectus, dated 15th August, 1921, and I hereby agree to accept the same or any smaller number of shares that may be allotted to me, and to make further payments thereon in accordance with the prospectus, and I authorize you to register me as the holder of the said shares"

Although the forms state that moneys have been paid, no payment in respect of the shares was in fact made until the 13th September, 1922.

What exact agreement was come to on the 12th August, 1922, can only safely be gathered from the terms of the following letter (No. 3452/M.H.), which is dated the 13th September, 1922, addressed to the testator's firm, and signed by the secretary of the company:—

"With reference to the arrangements arrived at in Calcutta with your principal, Lala Raghumal, when the latter agreed to take additional shares of the face value of Rs. 1,25,000, the applications for which you have already submitted in consideration for the same, we hereby agree to place our orders for materials required for the tramway through you and to give you consideration of all reductions which may be obtained either by you or by us on

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any tender submitted to our Consulting Engineers for the respective materials aforesaid.

" It is understood that you will pay us now the application and allotment money for these shares and that the balance of money on these shares will be payable by you on or after April, 1923, either by giving us credit in the invoices for materials or by cash payments. The orders for the material aforesaid will not be placed by you unless and until our Consulting Engineers approve of the respective firms or suppliers. All other conditions relating to this arrangement will be the same as already exist between us by virtue of of the agreement dated the 23rd February, 1922.

" This arrangement includes orders to be placed by us for the proposed extension between our present terminus at Mussoorie and the Library. It is understood that the proposed extension will be carried out as and when the Company decides."

On the same day the company wrote two other letters to the testator, agreeing to give him 10 per cent. commission on certain tramcars and equipments for which orders had already been placed elsewhere. On the same day there was paid to the testator out of the company's funds a sum of Rs. 35,000, for which a receipt was given in the following terms:—

" Received from the Dehra Dun-Mussoorie Electric Tramway Company, Ltd., the sum of Rs. 35,000 (Rupees thirty-five thousand) only, being advances for orders placed with us as per their letter No. 3452/M.H. of date.

"Dated the 13th September, 1922."

On the 13th September, 1922, the application and allotment moneys payable in respect of the shares covered by the application forms were paid to the company by the testator. The shares were allotted, and the testator was entered in the share register of the company as the holder of the said 10,000 ordinary shares and 250 preference shares, which will be hereafter referred to as the shares now in question.

The company failed to perform its obligations under either of the contracts above referred to, with the result that in the month of August, 1924, the testator instituted in the High Court of Calcutta a suit (No. 2251 of 1924) claiming damages and other relief in respect of the breaches by the company of the said contracts. Before this suit came to trial the company was ordered to be wound up by the High Court of Allahabad, the commencement of the winding up being the 29th January, 1926.

The testator died on the 5th September, 1926. The five appellants in the appeal No. 86 of 1930 are his executors.

On the 25th November, 1926, the official liquidators of the company served a notice on the testator's executors that the

list of contributories of the company would be settled on the 7th January, 1927, and that the executors were included in the list in respect of the shares now in question.

In January, 1927, the executors applied to the Court at Allahabad asking (1) for permission to continue the suit No. 2251 of 1924, and (2) that their names should not be put on the list of contributories until that suit had been disposed of. On the 19th July, 1927, the application, in both its branches, was refused.

The executors therefore brought forward their claims for breaches of contract in the liquidation. Judgment on them was delivered on the 14th May, 1929, by Mukerji and Young, JJ. In respect of the claim to damages for breach of the earlier contract there was awarded to the claimants as damages a sum of Rs. 7,884, with interest at 12 per cent. per annum from the 1st July, 1923, to the date of the winding up of the company. In respect of the claim to damages for breach of the later contract, the learned Judges held that the contract was an illegal agreement, being in contravention of S. 105 of the Indian Companies Act, 1913, with the result that, although there had been a breach on the part of the company, the claimants could recover no damages.

Meanwhile, on the 26th March, 1928, the official liquidators of the company had made an application in the winding up against the executors, by which they sought to recover from them as debtors to the company (amongst other sums) the said two sums of Rs. 27,000 and Rs. 35,000, and, in addition, a sum of Rs. 7,703-13-0, balance shown to be due on an account in the books of the company, which included as debits against the testator the said two sums of Rs. 27,000 and Rs. 35,000.

Judgment on this application was delivered by the same learned Judges on the 14th May, 1929. They held, apart from the question whether any part of the claim was barred by limitation, (1) that the sum of Rs. 27,000 was only an advance towards price and not a deposit or earnest money, that the liquidators were entitled to recover it, but that the executors were entitled to set off against it the damages awarded to them as aforesaid; (2) that the sum of Rs. 35,000 was paid also by way of an advance towards price and not as a deposit or earnest money, and that the liquidators were entitled to recover

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it; and (3) that they were also entitled to recover the balance on account of Rs. 7,703-13-0.

Upon the questions of limitation their findings were as follows: As to the sum of Rs. 27,000, they held that it became repayable at the end of June, 1923, when the company made default in taking delivery of goods, and that accordingly the period of limitation (whatever it might be) commenced to run on the 1st July, 1923; that Art. 51 of the first schedule to the Limitation Act applied and that accordingly the period of limitation would not expire until the 1st July, 1926. As regards the sum of Rs. 35,000, they held that the contract under which it was paid being illegal, the money became immediately repayable as money had and received on the 13th September, 1922. If the company had known of the transaction, then Art. 62 would apply and the period of limitation would expire on the 13th September, 1925. They found, however, that the company was never aware of the payment, and that either Art. 95 or Art. 120 applied, with the result that the period of limitation would not expire at the earliest until the 13th September, 1928. As regards the balance of Rs. 7,703-13-0, they held that the period of limitation began to run on the 31st March, 1924, the end of the year of account with the result that under Art. 85 the period did not expire until the 31st March, 1927.

It will be observed that in the case of each of the three items the learned Judges found that the period of limitation had not expired, but was still current at the date of the commencement of the winding up, *viz.*, the 29th January, 1926. Upon that footing they held that all three sums were recoverable, upon the ground that the rule of limitation would cease to apply to any debt not already barred at the commencement of the liquidation. "If any claim happens to be within limitation when the winding up commenced, there would be no further application of the rule of limitation." In the result they allowed the claims of the official liquidators for recovery of the three sums, amounting altogether to Rs. 69,703-13-0, with simple interest at 9 per cent. per annum, from the 31st March, 1924, to the date of the claim, with interest upon the aggregate amount (*viz.*, Rs. 94,710-2-0) at 6 per cent. per annum until realisation.

The next event was a petition presented to the High Court at Allahabad by the executors, praying that their names might be removed from the list of contributories of the company with

regard to the shares now in question, and further praying that the sum of Rs. 31,250 paid as application and allotment moneys with regard thereto might be paid to the executors, with interest thereon at 12 per cent. per annum.

The foundation for this application was (not unnaturally) the fact that the Court had already adjudicated upon the agreement entered into on the 12th August, 1922, and the 13th September, 1922, and had in proceedings between the same parties pronounced it to be illegal and void. Judgment was pronounced by Mukerji and Young, JJ., on the 20th November, 1929. The learned Judges held that the application was out of time, not having been made within 30 days of the 19th July, 1927, being the date on which the Court had refused the application of the executors to postpone the placing of their names upon the list of contributories until their suit in the High Court of Calcutta had been disposed of. This decision turned upon a question of construction of the Allahabad High Court Rules under the Indian Companies Act. The application was, however, also considered on the merits and dismissed, upon the ground that there existed a valid contract to take the shares to which the illegal agreement was only collateral.

The two appeals which have been presented to His Majesty in Council, and have been argued before the Board, may now be defined. The one (No. 127 of 1930) was presented by four of the testator's executors against the liquidators and the remaining executor, and seeks to reverse the High Court's decree dismissing the application in regard to the list of contributories. The other (No. 86 of 1930) was presented by all the executors against the liquidators, and seeks to reverse the decree of the High Court passed in accordance with the judgment which allowed the claims of the liquidators to the three sums of Rs. 25,000, Rs. 37,000 and Rs. 7,703-13-0.

There has been no appeal from the High Court's decree upon the claims of the executors in the liquidation for damages for breaches of contract.

Their Lordships have deemed it advisable to reserve further consideration of appeal No. 86 of 1930, but they do not consider it necessary to delay dealing with appeal No. 127 of 1930.

Upon that appeal it was contended (1) that it had been decided as between the parties in other litigation that the

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arrangements of the 12th August, 1922, and the 13th September, 1922, constituted one indivisible contract, which was illegal and void; (2) that these matters were *res judicatae*, and (3) that since the contract to take shares was void, the executors were under no liability in respect of the shares, but were entitled to have their names removed from the list of contributories, and to have the application and allotment moneys repaid.

Other arguments were advanced, but, in their Lordships' opinion, this appeal should be dismissed upon one short but sufficient ground. They will assume in favour of the appellants that the matters claimed to be *res judicatae* were *res judicatae* within the Code of Civil Procedure, but although they are prepared to make this assumption, they desire to state clearly that they do not assent to the view of the High Court that the contract in question contravened the provisions of S. 105 of the Indian Companies Act. But even with this assumption made in their favour, the appellants cannot, in their Lordships' view, succeed. Whatever may have been the rights and liabilities of the testator before the winding up intervened, the position was altered by the happening of that event. At the commencement of the winding up he was and had for over three years been entered on the register of shareholders as the holder of the shares now in question, with his full knowledge and assent. On the winding up, S. 156 of the Indian Companies Act came into play. His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding up his liability in respect of the shares arose *ex lege* and not *ex contractu*. It was conceded that the position of the executors was no better than that of the testator. In their Lordships' opinion, this point disposes of the first appeal, which should accordingly be dismissed. This view renders it unnecessary to consider whether the application was out of time. Their Lordships, however, think it right to state that, as at present advised, they are unable to understand how the period of 30 days mentioned in R. 58 of the Rules before mentioned can have commenced to run unless and until the notice contemplated by R. 57 had been served. This admittedly was never done.

Their Lordships will humbly advise His Majesty that this appeal (No. 127 of 1930) should be dismissed. The appellants will pay the costs of the appeal.

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Solicitors for appellants: *Messrs. W. W. Box & Co.*

Solicitors for respondents: *Messrs. Cardew, Smith & Ross.*

S. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE PAKENHAM WALSH.

Ramammal .. *Petitioner**

v.

Vijayaraghavalu Naidu and another .. *Respondents.*

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Ramammal *v.* Vijayaraghavalu Naidu.

Criminal Procedure Code (V of 1898), *S.* 491—*Application for writ of Habeas Corpus—Costs—Jurisdiction of Court.*

The High Court has no jurisdiction to award costs in an application for a writ of Habeas Corpus.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *Habeas Corpus* to the respondents herein to produce the body of the petitioner's unmarried minor son, Thiruvengadaswami, in Court and also to issue an injunction restraining the said respondents from celebrating the marriage of the said minor on the 24th June, 1928, or any other day pending this petition.

K. S. Desikan for petitioner.

V. V. Srinivasa Aiyangar and *C. Sarangaraja Aiyangar* for respondents.

The Court made the following

ORDER.—This petition is withdrawn. We very much regret to come to the conclusion that we have no power to grant costs *proprio motu.* In some ways perhaps it is to be regretted that we have not because a lot of these applications are so thoroughly frivolous—I do not say anything about this one—that I think that the losers ought to be penalised for vexatious proceedings. However, costs are a creature of statute or

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*Cr. M. P. No. 471 of 1928. 23rd August, 1928.

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statutory rules and in the absence of either in this case, we must hold that we have no jurisdiction to award costs.

S. R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

S. Alwar Chetty .. *Appellant* (Plaintiff)*

v.

The Madras Electric Supply Corporation, Ltd. .. *Respondents (Defts.).*

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Nuisance—Noise and vibration—Electric dynamos—Owner of adjacent premises—Right to sue for damages and injunction.

A suit is not maintainable by a non-occupying owner in respect of a nuisance which is only alleged to be personally injurious to the occupier. An owner, as distinguished from the occupier, can sue without joining the occupier if the nuisance is such as to cause injury to the reversion, in case the nuisance is of a permanent character and injurious to the property.

Jones v. *Chappell*, (1875) 20 Eq. 539; *House Property and Investment Company* v. *H. P. Horse Nail Company*, (1885) 29 Ch. D. 190 and *Jones* v. *Llanrwst Urban District Council*, (1911) 1 Ch. 393 at 404, referred to.

The Madras Electric Supply Corporation, Ltd. were authorised by a licence from the Government of Madras to supply electricity to the City. The plaintiff who was owner of a certain house adjoining the building of the Electric Supply Corporation sued for an injunction and damages on the ground that owing to noise and vibration caused by the dynamos worked by the defendants his property was affected injuriously.

Held, on the evidence, affirming the judgment of Waller, J., that no such nuisance as would entitle the owner for a claim of damages or injunction had been made out.

Distinction between temporary and permanent nuisances pointed out.

On appeal from the judgment of the Honourable Mr. Justice Waller, dated 20th January, 1931 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 213 of 1930.

S. Srinivasa Aiyangar, T. C. A. Anandalwan and *T. C. A. Bhashyam* for appellant.

Nugent Grant, V. V. Srinivasa Aiyangar and *O. T. G. Nambiar* instructed by *Messrs. Moresby* and *Thomas* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—This appeal is filed by the plaintiff against the decree of our brother Waller, J., dismissing his suit for certain injunctions and for damages. The plaintiff

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*O. S. A. No. 31 of 1931 6th May, 1932.

is the owner of premises No. 31, Thambu Chetty Street, Madras, G. T. Thambu Chetty Street runs from north to south, and No. 31 is on the western side. Next to the north of No. 31 are Nos. 32 and 33. No. 33 belonged originally to the Municipal Corporation of Madras. The defendants in the case are the Madras Electric Supply Corporation, Ltd., a company registered under the English Companies Act with its head office in the City of London. Under the provisions of the Indian Electricity Act of 1903 the defendants have obtained a licence from the Madras Government to supply electricity to the city of Madras, for lighting and other purposes. No. 33 in the street was originally utilised by the Municipal Corporation as an office for water works, but while keeping the front portion to themselves the Municipal Corporation sold the back portion of the house to the defendant company in 1917 for installing rotaries or electric dynamos for the purpose of supplying electricity for lighting purposes to the city. In 1925 premises No. 32 were acquired under the Land Acquisition Act for the use of the company. Originally the machinery that was installed in Thambu Chetty Street consisted of two machines, one 60 Kilo-Watt and one 160 Kilo-Watt. These were supplemented in 1921 when two 250 Kilo-Watts were put in. In 1926 a 1000 K. W. was put in, and in 1927 a 250 K. W. was put in. Finally in 1928 or thereabouts the electric dynamos in the premises Nos. 32 and 33 consisted of two 1000 K. Ws., two 500 K. Ws. and one 250 K. W. Of the two 1000 K. Ws. and of the two 500 K. Ws. only one machine would be working and the other is described as a stand-by, *i. e.*, a machine to be used in emergency when the other machine fails, and it is said that both are not intended to be worked. The present practice of working the machines stands thus. From 10-30 P.M. to 5-30 A.M. one 250 K. W. is the only machine that works, and there is no stand-by for this kind of machine for if it fails a 500 K. W. can be worked; from 5-30 A.M. to 8-30 A.M. one 250 K. W. and one 500 K. W. machines will be working and from 8-30 A.M. to 10-30 P.M. one 500 K. W. and one 1000 K. W. will be working. The plaintiff purchased his house premises No. 31 in 1927. In 1926 when the 1000 K. W. was put in, there was some complaint from the inhabitants of the street about the noise caused by the rotary. Thereupon the Municipal Corporation addressed Ex. C-1, dated 4th May, 1926, to the company inquiring

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if arrangements could be made to diminish the noise, and in their reply, Ex. C-2, dated 11th May, 1926, the Company said that every arrangement would be made to cause as little unnecessary noise as possible. On the 27th May, 1926, the Electrical Engineer addressed Ex. C-4 inquiring if the noise was mitigated. Ex. C-5, dated 2nd June, 1926, is the reply saying that steps are being taken to lessen the noise. Ex. C-6, dated 10th July, 1926, is the further inquiry by the Electrical Engineer. Ex. C-7 is another letter, dated 8th October, 1926, and Ex. C-8 is the reply dated 21st October, 1926, saying that there is nothing further to add. One of the Commissioners of the Corporation gave notice of a resolution that the electric power station should be removed. This was on the 8th September, 1928. But in October it was suggested that he should drop the resolution as the Electric Corporation gave an assurance that the noise would be minimised. Nevertheless the resolution was actually moved on the 24th October, 1928, according to which the Electric Power Station should be removed from Thambu Chetty Street. Thereupon the defendants were informed that the Commissioner of the Municipal Corporation would inspect the place on the 6th November, 1928. *See* Ex. II-n. The Commissioner inspected the station on 6th November, 1928, and he was of opinion that the two houses on either side of the power station were affected by the noise. But he thought they could do nothing as the houses were sold to the company expressly for this purpose. In October, 1929, the defendants applied to the Municipal Corporation for sanction to erect certain additional buildings in the power station. Originally in November the sanction was not granted, but on 26th November the defendants explained that they were not erecting any additional machinery but that they were only going to instal two stand-by machines. Thereupon the necessary sanction was granted in December, 1929, by Ex. II-q. In pursuance of the sanction the defendants began to dig in premises No. 32 and alongside the northern wall of premises No. 31 for the purpose of laying foundations of the new wall to be erected. The working of digging and pulling down the old wall seems to have caused some noise and vibration. This of course could be only temporary, and the tenant occupying the plaintiff's house No. 31 seems to have complained to the landlord (the plaintiff) about the work of demolition. Probably a letter was

written on 6th April, 1930, containing this complaint. On 8th April the plaintiff's advocate gave a notice of action, which is Ex. I. This letter states that the owner, the plaintiff, received a complaint from the tenant and occupier of the premises that the "electric plant and machinery you are putting up and enlarging in the adjacent premises No. 32 are seriously, materially and unreasonably interfering with the physical comfort and enjoyment of premises No. 31 owing to the incessant noise and humming of dynamos." The letter then proceeds to refer to the interference with the right of easement in respect of the northern wall by digging its foundations and trying to put another wall preventing access to the northern portion of the plaintiff's wall in cases of emergency. The defendants were asked to abandon the projected wall or to build it in such a way as to admit access to the northern front. The action was actually filed on 28th April, 1930. Paragraph 5 of the plaint alleges that the noise was interfering with the physical comfort and enjoyment and the vibratory and jarring effects produced by the machinery are rendering the plaintiff's walls unsafe. Paragraph 11 estimates the damages at Rs. 9,000. The cause of action arose in 1927 and subsequently. The defendants claim that they are not liable as they were authorised to supply electricity to the city of Madras under the powers conferred by statute, but this point was found against them by the learned Judge and no further reference need be made to this. They deny that there is any substantial nuisance to the neighbouring residents or that the plaintiff's house was affected by their machinery. They deny the vibration. They also state that the plaintiff purchased the house in 1927 and that he would not have done so if really there was any noise or vibration in the nature of a nuisance. The learned Judge who tried the suit found that as the plaintiff is not the occupier, the suit is not maintainable. He referred to *Cooper* v. *Crabtree*[1] and *Jones* v. *Chappell*[2]. He remarked that the noise of the defendants' machinery is not permanent. On the merits he found that it has not been proved that the noise amounted to an actionable nuisance and that the plaintiff's house is benefited by the new walls erected by the defendants which must have deadened the noise considerably. He therefore dismissed the suit with costs.

1. (1881) 19 Ch. D. 193. 2. (1875) 20 Eq. 539.

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Immediately after the suit was filed the plaintiff obtained an injunction restraining the defendants from proceeding with the work of building the southern wall at the place where the foundations were dug. But in the vacation the injunction was dissolved, and the defendants were given permission to proceed with the work of building the wall. Soon after they commenced to build the wall. By December, 1930, the wall was finished, but even then the roof was not finished. At about that time the learned Trial Judge went and made an inspection of the spot. We have also made an inspection of the building in premises Nos. 32 and 33. Merely for the purpose of making the facts clear the present situation may be thus described. In premises No. 32, that is immediately north of the plaintiff's house, there are two transformers which do not make any noise, and they may be left out of account. There are two rotaries, *i. e.*, one 500 K. W. rotary and one 250 K. W. rotary. Towards the inside of the building, *i. e.*, towards the west, one passes from No. 32 to 33 and in the inner portion of premises No. 33 we have a 500 K. W. rotary and two 1000 K. W. rotaries, one of which is a stand-by. The eastern portion of premises No. 33 does not belong to the defendants; it still belongs to the Municipal Corporation. The southern portion consists of two rooms: a store-room and a washing room. The northern portion is merely a passage from the street into the defendants' premises. Though this passage belongs to the Municipal Corporation the defendants has a right of way over it. The southern wall of the whole premises contains no window, and no sound can pass through that wall to the plaintiff's house. At the top of the wall there is a roof of a lesser width than the space separating the walls, and it contains some ventilators. The roof over No. 33 is of a smaller height than the roof over No. 32, and the wall towards the north of premises No. 33 is of a smaller height than the wall of premises No. 32. In other words, there is no deadening wall in the north of No. 33. As a matter of fact at present the noise from the premises can be distinctly heard in No. 34, but in No. 31 it is scarcely audible in the day-time when we inspected. Of course if one places his ear on the walls and watches for the noise, one can hear it. In one room in the north of premises No. 31 occupied by a student it is heard a little better. But in December, 1930, when the premises were inspected by the learned Trial Judge the noise must have been

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somewhat more distinct because the roof was not then erected, and in April, 1930, when the action was filed the building of the wall was stopped by injunction, and the noise must have been far more distinct.

[Their Lordships after traversing the evidence, oral as well as documentary, in the case, continued :]

Upon the evidence for the plaintiff the net result left upon one may be summed up as follows:—The case was started on account of the apprehension of the safety of the house by the digging for the new foundations north of the plaintiff's house; when the suit was actually launched, the vibration was added as an after-thought and Ex. A-1 was altered correspondingly to suit the addition; there was really no vibration by which I mean vibration to the ground communicated to the neighbouring house (not vibration caused by a sound which, unless the sound is very great, can have no effect) the vibration is practically nil; the cracks in the house are really due to the house being an old house and have nothing to do with the vibration—possibly they may be due to the deprivation of the lateral support at the time of digging the foundations—but for two years there is no increase in the cracks; as to the noise practically there is none that disturbs sleep between 10-30 P.M. and 5-30 A. M. but when the machines change at 5-30 there is a sudden noise for a minute or two which may disturb one's sleep and there is slightly less noise between 9 and 10-30 P. M. If one would take 9-30 P.M. as the normal hour for going to sleep, one's sleep is disturbed for an hour. This must have been the state of things at the time the action was launched. After the building of the deadening wall to the north of the plaintiff's house, the noise is practically not worth mentioning except between 9 and 10-30 P. M. when it is slighter than before but still exists but not in such a substantial manner as to entitle the plaintiff to a relief in a court of law.

In the face of the above conclusions it is practically unnecessary to discuss any question of law arising in the case, but as the point has been elaborately argued I think it is necessary to state my opinion on the matter. The learned Trial Judge relying on *Cooper* v. *Crabtree*[1] and *Jones* v. *Chappell*[2] held that the plaintiff not being the occupier cannot maintain the action. In

1. (1881) 19 Ch. D. 193. 2. (1875) 20 Eq. 539.

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Simpson v. *Savage*[1] it was held that the landlord could not maintain an action for injury to the reversion caused by the erection of workshops and a forge and chimney on adjoining land producing smoke and making loud noise. In *Jones* v. *Chappell*[2] it was held that the owner cannot maintain an action to restrain a temporary nuisance such as the noise of machinery in adjacent premises. The defendant in that case erected steam-engines and stone saw-mills and other machinery therein. It was held that the plaintiff could not maintain the action. Sir George Jessel, M. R., after referring to *Simpson* v. *Savage*[1], observes:

> "The injury is a temporary nuisance, because the saws might be stopped and the steam-engine might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession. Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficu t for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson* v *Savage*[1] etc."

The second paragraph of Sir George Jessel, M. R.'s remarks produce the impression that he would have been glad to overrule *Simpson* v. *Savage*[1], but though he could not. In *Cooper* v. *Crabtree*[3] the defendant put up some poles and hoarding to prevent the plaintiff's house from acquiring a right to the easement of light. The nuisance complained of here is very temporary in its nature. One may regard the defendant's conduct in the case as whimsical, and he may change his whim at any moment. In such circumstances it may perhaps be proper to hold that the absentee owner has no right to maintain the action. The case was affirmed in *Cooper* v. *Crabtree*[4]. But the ground of the appellate judgment is that the poles and hoarding are not of such a permanent character as to injure the reversion and the erection of the poles was too trifling to entitle the plaintiff to an injunction. In Clerk and Lindsell on Torts, 8th Edition, at pages 376 and 377, the cases are collected. The criticism at page 377 shows that the English rule itself has not had the acceptance of Judges and text-writers. In Gale on

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1. (1856) 1 C. B. (N. S.) 347: 140 E. R. 143.
2. (1875) 20 Eq. 539.
3. (1881) 19 Ch. D. 193.
4. (1882) 20 Ch. D. 589.

Easements, 10th Edition, page 511, the rule is summed up in this form. According to the modern authorities, an interference will be injurious to the reversion if (1) it be something which will in the future continue to the time when the reversion falls into possession, or if (2) it be something which in the present operates as a denial of the right of the reversioner. (*Vide* Kerr on Injunctions, page 135, 6th Edition.) The remarks of Parker, J., in *Jones* v. *Llanrwst Urban District Council*[1] are specially quoted. There he says:

"I take 'permanent,' in this connection, to mean such as will continue indefinitely unless something is done to remove it."

It may be that the poles and hoarding in *Cooper* v. *Crabtree*[2] obviously could not be regarded as permanent. In *Tinkler* v. *Aylesbury Dairy Company, Ltd.*[3] the suit was for restraining the defendants from working an engine on the premises and loading or unloading carts, etc. Kekewich, J., observed:

"If the existence of a nuisance was conclusively proved, injury to property followed, and if injury to property was proved, there was strong, though not conclusive, evidence of nuisance."

Finally he observed:

"In the day-time the cart noise was merged in the greater din of the street traffic"

He found that the noise in the defendants' business had driven people from the neighbourhood and that on the ground of interference with personal comfort there was a nuisance in respect of which relief must be granted. In *Wood* v. *Conway Corporation*[4], a judgment of the Court of Appeal, Buckley, L.J., observed:

"If the owner is substantially injured in the reasonable enjoyment of the property so that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction"

It is there found that the plaintiff's plantation suffered from the fumes and smoke from the defendants' gasworks. As to the argument based upon the nuisance being temporary, Cozens-Hardy, M. R., observed:

"We have heard a great deal about it being temporary. That argument seems to me to have nothing whatever to do with the case. This is not the case of a man carrying on a business which he may give up next week." (It may be said that in the case of *Cooper* v. *Crabtree*[2] the poles and hoarding may be removed in a week.) "It is the case of a corporation which succeeded a parliamentary gas company. . . . . as is quite clear from the Act of Parliament, an obligation was imposed on the corporation to supply gas from their works to their customers."

1. (1911) 1 Ch. 393 at 404.
2. (1881) 19 Ch. D. 193.
3. (1888) 5 T. L. R. 52.
4. (1914) 2 Ch. 47.

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Ramesam, J.

The last remark of Cozens-Hardy, M. R., is very important to the present case. In the present case the defendants have been authorised by licence from the Madras Government to supply electric light to the city of Madras, and one may observe it is practically impossible that the defendants' works will cease within a week or even years. In *Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *City of London Electric Lighting Co.*[1] it was held that both the reversioner and the owner could maintain an action. In the particular case only damages were given. In *Heath and others* v. *Mayor etc. of Brighton*[2] it was found as a fact that the sound of the electric lighting works did not generally distract the attention of ordinary healthy persons and was not a legal nuisance. In *Wilson* v. *Townend*[3] it was held that the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation and it is not necessary that a plaintiff should be in the actual occupation of the property. In my opinion in this case if there had been a substantial nuisance to the tenants and therefore of a kind which could be regarded as detrimental to the letting value of the plaintiff's house the plaintiff would be justified in maintaining the action. In 21 Halsbury, S. 943, the rule is stated in almost identical terms as was stated in Gale on Easements already quoted. If on the facts I had found that there is a substantial injury in the terms described, I would have held that the plaintiff could maintain his action. But on the facts I have found that there is no such nuisance as would justify either the occupier or the landlord in complaining of the defendants' works as a legal nuisance. Such little justification as might have existed before the deadening wall was erected had ceased after the erection of that wall. If the contemplated erection of that wall was not known to the plaintiff, that will be a ground for disallowing costs to the defendants in the Trial Court. From 1926 onwards, complaints were received by the Municipal Corporation from the residents of the locality about the noise caused by the machinery. In the various replies that the defendants gave to the Municipal Corporation Engineer contained in Ex. C series beyond saying that arrangement would be made to cause as little unnecessary noise as possible there is no further informa-

1. (1895) 1 Ch. D. 287.
2. (1908) 98 L. T. 718.
3. (1860) 1 Dr. & Sm. 324: 62 E. R. 403.

tion as to the manner by which the noise was to be minimised. Even in October, 1929, when the defendants gave an assurance that the noise would be minimised there is nothing to show the nature of the steps intended to be taken for minimising the noise. Again in April, 1930, when the plaintiff gave a notice of action to the defendants it is obvious that he was under the impression that the object of the defendants was to instal new machinery and it was for this purpose that the old wall was being demolished and the foundations for the new wall were being prepared. It refers to the " electric plant and machinery you are putting up and enlarging in the adjacent premises". In neither of the two replies, dated 9th April and 15th April, is there any reference to the contemplated erection of a deadening wall which will diminish the annoyance caused to the plaintiff's house by the noise. The letter of 15th April merely says that the new building proposed to be erected will not interfere with the plaintiff's rights as the owner of his house. This is entirely different from saying that the new wall will actually diminish the noise that was theretofore caused to the residents in plaintiff's house. It is true that the plaintiff knew the building of the wall, but there is absolutely nothing in the whole record to show that the plaintiff knew or that it was pointed out to him that the effect of the building of the new wall would be to diminish the noise and the annoyance caused by it particularly in the evening hours between 9 and 10-30 P.M. If the defendants had pointed this out to the plaintiff and asked him to wait until the wall was finished and then judge the state of things, the plaintiff would have had no justification in going to Court after such a reply. As it is, it is difficult to say that the plaintiff was wrong in going to Court though, as the nuisance had ceased to exist in a substantial manner during the pendency of the action on account of the finishing of the wall, the plaintiff has now become disentitled to any relief. If the deadening wall had not been built, the plaintiff would have a cause of action entitling him to at least damages if not injunction. I think the defendants are to be blamed for not pointing this out to the plaintiff and asking him to wait until the wall is finished. If he did not listen to such advice then he would not be entitled to rush to the Court. On these grounds I would disallow the costs of the defendants in the Trial Court. But as these reasons did not exist for the plaintiff's filing the appeal, I dismiss the appeal

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with taxed costs with the modification as to costs in the Court below. (Certify for two Counsel.)

Cornish, J.—I agree that the appeal fails. The plaintiff has put his case upon two grounds: firstly, that the vibration produced by the defendants' machinery has rendered the walls of his house unsafe; and, secondly, that the noise of the machinery has so interfered with the comfort of the plaintiff's tenants in the house as to constitute an actionable nuisance.

If the cracks in the wall of plaintiff's house have, as alleged, been caused by the vibration of the machinery, then, the nuisance being one which is actually damaging his property, the plaintiff, as owner, would undoubtedly be entitled to sue and to obtain an injunction: *Wood* v. *Conway Corporation*[1]. But I agree with the learned Trial Judge that the plaintiff has failed to prove his case. The plaintiff has not gone into the witness-box to say that the cracks were caused by the vibration, and his expert witnesses do not say so. None of them was able to detect vibration in the plaintiff's house or in the passage between it and the defendants' premises. The utmost that one of these witnesses, P. W. 14, says, is that vibration would aggravate the cracks; and he gave the opinion that the major reason for the cracks was the settlement of the wall owing to its foundation having been disturbed by excavation. But that is not the case in the plaint.

Turning to the second ground of complaint, a suit is not maintainable by a non-occupying owner in respect of a nuisance which is only alleged, as in paragraph 10 of the plaint, to be personally injurious to the occupier: *Jones* v. *Chappell*[2] and *House Property and Investment Company* v. *H. P. Horse Nail Company*[3]. An owner, as distinguished from the occupier, can sue without joining the occupier if the nuisance is such as to cause injury to the reversion; and the nuisance from noise or smell, apart from causing personal discomfort, may, as pointed out by Buckley, L. J., in the *Conway Corporation case*[1], be of such a character as to injuriously affect the value of the reversion. But the nuisance must be of a permanent character and injurious to the property. This is clear from the judgment of Parker, J., in *Jones* v. *Llanrwst Urban District Council*[4], where he says:

1. (1914) 2 Ch. 47.
2. (1875) 20 Eq. 539.
3. (1885) 29 Ch. D. 190.
4. (1911) 1 Ch. 393 at 404.

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"If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury. I take 'permanent,' in this connection, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in their nature permanent within the rule, for they cease of themselves, unless there be some one to continue them"

In the present case, there is no doubt that the noise complained of is "permanent" within the meaning of the rule. The defendants are under a statutory duty to supply electricity, and it appears upon the evidence that in the fulfilment of their obligation it would be impracticable for them to alter the working of the machines or to instal a different system of machinery. The alleged nuisance is, therefore, incapable of being regarded as of a temporary character, which is likely to be stopped at any time: *Wood* v. *Conway Corporation*[1]. The plaintiff, however, in order to succeed in this suit, must prove that the noise has injuriously affected the value of his property. He has produced no proof of injury to the property as a consequence of the noise; and with regard to the alleged nuisance to the occupier, the learned Trial Judge has come to the conclusion that the noise does not amount to a nuisance. He finds that in point of fact the comfort of the residents in the immediate neighbourhood of the defendants' premises is not materially diminished by the noise. The learned Judge was entitled to come to that conclusion upon the evidence, and I see no reason to differ from it.

But I think that the slowness of the defendants in carrying out the assurance which was given by them to the Madras Corporation in 1926 to do something to meet the complaints about the noisewas in a large measure responsible for this suit, and justified the special order as to costs which my brother Ramesam, J., has proposed.

K. C. *Appeal dismissed.*

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1. (1914) 2 Ch. 47.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Sattamuthu Chettiar .. *Petitioner** (*Plaintiff*)

v.

Abdul Kareem Maracayar
and others .. *Respondents* (*Defendants* 1 *to* 4).

Sattamuthu Chettiar *v.* Abdul Kareem Maracayar.

Negotiable Instruments Act (*XXVI of* 1881), *S.* 35—"*Contract to the contrary*"—*Apparently unqualified endorsement—Nature of transaction—Exclusion of personal liability—Inference of—Permissibility.*

The indorser of a negotiable instrument who indorses without restricting his liability in the indorsement by express words makes himself liable to the indorsee as surety for the amount of the instrument in case of dishonour. The rule is, however, subject to "any contract to the contrary" by which, although the indorsement is *ex facie* unrestricted, the indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction, excluded his personal liability.

Where at a partition of family properties, a promissory note executed by a third party in favour of the father was endorsed by him in favour of his adult son as part of the assets allotted to the latter,

Held, that the Lower Court was justified in drawing an inference from the nature of the transaction that the father intended to exclude his personal liability as indorser and that the son had no right of recourse against the father on default by the maker.

Macdonald v. *Whitfield*, (1883) 8 App. Cas. 733, relied on.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Negapatam in S. C. S. No. 462 of 1928.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for petitioner.

A. V. Viswanatha Sastri for respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the plaintiff. His suit was brought on a promissory note executed by the 1st defendant in favour of the father of the plaintiff and defendants 2 to 4 and endorsed by the father to the plaintiff as one of the family assets allotted to the plaintiff on the latter's releasing his rights in the family properties. The only point now arising for consideration is whether the Lower Court was right in dismissing the suit as against defendants 2 to 4 or whether it should have given a decree against them also on the ground alleged by the plaintiff that the father having indorsed the note to the plaintiff and the maker having defaulted payment, the father was himself personally responsible as the indorser and defendants

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*C. R. P. No. 596 of 1929. 3rd August, 1932.

Sattamuthu Chettiar v. Abdul Kareem Maracayar.

2 to 4 are liable as his legal representatives to the extent of his assets in their hands. The ground on which, while giving a decree against the maker of the note, the 1st defendant, the learned Judge in the Court below refused to give a decree against the assets of the father in the hands of defendants 2 to 4 is that the note was endorsed to the plaintiff as part of a partition, and it is to be presumed that the learned Judge thought that in those circumstances the personal liability of the indorser was negatived by the nature of the transaction.

In this Court the petitioner's learned advocate has urged first, that under S. 35 of the Negotiable Instruments Act the only way in which the father could have excluded personal liability as indorser of the note was by expressly endorsing it "without recourse" and, that not having been done, it is not open to the Court to infer any other ground of exemption from liability. It was also urged that there was nothing in the nature of the transaction that the endorsement was part of a family partition wherefrom it may be inferred that the indorser intended to exclude personal liability.

On the first question the words of S. 35 of the Negotiable Instruments Act are clear enough. It says that

"in the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without in such indorsement expressly excluding or making conditional his own liability is bound thereby to every subsequent holder in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage by such dishonour etc."

The words make it clear that the rule whereby the indorser of a negotiable instrument who indorses without restricting his liability in the endorsement by express words makes himself liable to the indorsee as surety for the amount of the instrument in the case of dishonour is subject to there having been no contract to the contrary, *i. e.*, that although the indorsement is *ex facie* unrestricted, the indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction, excluded personal liability to the latter. No Indian authority was cited on this point: but English authorities are ample. In *Denton* v. *Peters*[1] a partner indorsed to his co-partner a bill accepted by a person who was indebted to them for goods sold. On the debtor defaulting payment the indorsee brought a suit against the indorser and pleaded that

1. (1870) 5 Q. B. 475.

Sattamuthu Chettiar *v.* Abdul Kareem Maracayar.

the indorsement being on its face absolute and unrestricted, he was entitled to a decree. But when it appeared that the parties had been partners and the indorsement was made to enable the plaintiff to collect the money from the debtor for their joint benefit, the Court held that the form of the indorsement notwithstanding, the defendant was not liable to the plaintiff. That decision was in 1870, before the Bills of Exchange Act. In *Macdonald* v. *Whitfield*[1], a case from Canada, where the law on this point is the same as that of England, the directors of a company in order to make themselves personally liable to a bank from which the company was borrowing money made successive indorsements of the bill on which the money was borrowed. And the indorsements by one director to another and by him to a third and by him to a fourth and so on were on their face unconditional and unrestricted. But it was proved that the purpose of the indorsements and the arrangement in pursuance of which they were made was not that they might stand surety to each other but that they might all as between themselves and the bank be surety for the debt advanced to the company. On those facts it was held that far from the indorser being liable for the whole amount to his indorsee and that indorsee in his turn as indorser to his indorsee and so on they were all liable equally to contribute to the debt if one of them had paid it. Lord Watson stated:

"It is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers, and that reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law-merchant would otherwise assign to them."

This decision was in 1883 soon after the English Bills of Exchange Act. Nothing has been cited to show that these decisions which are of the highest authority are not good law according to S. 35 of the Negotiable Instruments Act. It follows that the Lower Court was right in looking at the nature of the transaction to ascertain whether there was in fact any undertaking by the father of the plaintiff to stand guarantee for the payment of the note indorsed to the plaintiff.

It appears to me that the only answer possible upon the facts which are admitted is in the negative. The family was a

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1. (1883) 8 App. Cas. 733.

trading family, the plaintiff was a son by the first wife of the father, and defendants 2 to 4, who are minors, are the children of the second wife. It was found necessary to effect a partition and the plaintiff was given a share. Thereupon he withdrew from the family by Ex. I, which recites quite explicitly that he had no longer any rights in the family properties and took for his share the assets therein stated altogether amounting to Rs. 35,500. One of these assets was the suit note for Rs. 550 executed by a stranger, the 1st defendant, to the head of the family, the father. Besides this, there were four other notes, which were similarly indorsed, of the total value of Rs. 5,000, and the rest of the amount was made up of Rs. 13,950 paid in cash, Rs. 5,000 by credit opened in the plaintiff's name in a firm at Negapatam and Rs. 11,000 secured by a promissory note given by the father. Having regard to the nature of this transaction it is impossible to understand how the father, who was handing over family assets, should have made himself personally liable and he could only do so out of his own share of the family property to the plaintiff in case any of the outstandings were not duly paid. Where at a partition family properties are divided and the parties, being majors and able to look after themselves accept the properties allotted for their share of the assets, it is too much to say that there is as between them a covenant for title or a guarantee of payment by strangers to the family. In my opinion the learned Judge drew the correct inference from the facts that there was no such undertaking between the plaintiff's father and himself.

It is urged that this question was *res judicata* by a decision given in respect of another promissory note on which the plaintiff succeeded in getting a decree against defendants 2 to 4. If the plaintiff was fortunate enough to get such a decree, I cannot deprive him of it, but certainly it is not *res judicata* in this case.

The Civil Revision Petition must be dismissed with costs.

S. R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

R. Shanmuga Rajeswara Sethupathi *alias* Naganatha Sethupathi Avl., Rajah of Ramnad, through his authorised Dewan, Rao Bahadur K. Srinivasa Rao Avl. .. *Appellant* in all the Second Appeals (Plaintiff in all cases)*

v.

Perumal Moopan and others .. *Respondents (Defendants).*

Rajah of Ramnad *v.* Perumal Moopan.

Madras Estates Land Act (I of 1908), S. 4—Suit for rent—Plea of lands left waste due to causes beyond control of ryots—Burden of proof.

Where in a suit for rent, the tenants pleaded that by custom they were not liable for rent for lands left waste due to causes beyond their control, the burden is on the ryots to prove the circumstances under which the lands could not be cultivated.

Ramasami Servaigaran v. *Athivaraha Chariar,* (1917) 7 L. W. 471, relied on.

Appeals against the decrees of the District Court of Ramnad at Madura in A. S. Nos. 862—866 and a number of other appeals of 1921 preferred against the decrees of the Court of the Special Deputy Collector of Ramnad at Manamadura.

The Advocate-General (Sir A. Krishnaswami Aiyar) for appellant.

Respondents not represented.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—These appeals arise out of decrees in a number of suits brought by the Rajah of Ramnad (the appellant) and the tenants (the respondents) against each other under S. 77, Madras Estates Land Act.

The Advocate-General for the appellant has argued that the findings of the District Court are erroneous under broadly speaking two headings :

1. That the rates awarded in respect of various crops are inadequate.

2. That the learned District Judge has put the burden of proving that waste lands were uncultivated through no fault

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*S. A. Nos. 37 to 44, 46 to 57 and 59 to 69 of 1929. 15th August, 1932.

of the tenant on the landlord whereas it was for the tenant to adduce this evidence.

We have after hearing the Advocate-General on point 1 indicated that in our view questions of the adequacy or inadequacy of rates (matters which have been most thoroughly investigated on evidence in the Courts below) do not call for an interference in second appeal being largely questions of fact and so far as this topic is concerned we dismiss the relevant appeals.

The second point however is a question of law and is clearly a matter of importance between landlord and tenant.

The matter arose out of a claim for rent for certain waste lands, by the appellant.

In reply to this claim the respondents in para. 6 of their written statement put in an involved plea the effect of which is agreed to be that the tenants are by custom not liable for rent for lands left waste "not on account of wilful default or personal liability".

It is at least clear that the parties went to trial on this basis, for issue 4 reads as follows:—

"Are the lands left waste in the several suits due to causes beyond the control of the ryots and is plaintiff not entitled to rent?"

The issue imposes the onus upon the defendants. It is not quite clear whether there was a dispute as to onus in the first Court but the Special Deputy Collector ruled that it was on the ryots and in the absence of any evidence by them to sustain it allowed the appellant's claim in respect of waste lands, at the same time stating the law as follows:—

"The person who sets up a special plea with a view to claim exemption from statutory liability has to prove the existence of special circumstances which bring his case under the exception."

This is a succinct and accurate statement of the rule of evidence applicable, which is to be found in Ss. 101 to 103 of the Evidence Act which state the English Common Law Rules as built up by numerous cases. There is a direct authority in Madras in *Ramasami Servaigaran* v. *Athivaraha Chariar*[1] on this exact question of onus as between landlord and tenant though there does not appear to have been much of any discussion on that point, the judgment being directed mostly to the question of whether the landlord can claim rent for waste lands at all. As to this, the Court held that as under S. 4 of the Estates

1. (1917) 7 L. W. 471.

Rajah of Ramnad v. Perumal Moopan.

Mockett, J.

Land Act the landlord is *prima facie* entitled to rent for all ryoti lands it is incumbent on the tenant to establish any custom on which he relies to excuse him and the facts which make that custom a shield. We consider that this decision exactly applies to the present case.

The case in *Rajah of Ramnad* v. *Meerasa Marakkayar*[1], which it has been suggested is contrary to *Ramasami Servaigaran* v. *Athivaraha Chariar*[2], is not in fact so, as the former case was decided on a special finding in favour of the ryots and it is to be observed that the Court (Phillips and Kumaraswami Sastri, JJ.) did not express dissent from *Ramasami Servaigaran* v. *Athivaraha Chariar*[2], although it was cited. The learned District Judge has however reversed the decision of the first Court on the question of onus. He says:

"The Deputy Collector wrongly threw the onus on the ryots to show that it was not due to their default the land lay waste; the onus really being on the landholder."

He gives no reasons for this decision and refers to no authorities and allows the ryots' appeals because there was

"absolutely no evidence . . . . that the waste was du to the ryots' default."

Since the onus had been put upon the ryots in the first Court this was naturally so. This decision is sought to be supported before us by the somewhat curious argument that the reason why the waste lands could not be cultivated was "peculiarly within the knowledge of the landlord"—though why the actual occupant of land should be unable to say why he cannot cultivate it has never been explained. The tenant whose business and presumably desire it is to cultivate his holding must surely of all men be in possession of the facts to which he can ascribe his inability to carry out the object for which he holds the lands. The present case cannot possibly be brought within S. 106, Evidence Act, as the respondents' advocate presumably seeks to do. For the above reasons we think the Deputy Collector was right and the District Judge wrong on the issue as to onus.

In the result S. As. Nos. 37 to 44 and 46 to 57 of 1929 which refer to the question of rates are dismissed and S. As. Nos. 59 to 69 of 1929 which refer to the question of onus are allowed.

No costs.

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1. (1918) 50 I. C. 892. 2. (1917) 7 L. W. 471.

Jackson, J.—I agree.

Rajah of Ramnad v. Perumal Moopan.

Jackson, J.

The question agitated in these appeals, what is the proper rate for plantains grown upon dry land, is a new one, for which, on this estate, there is no guidance to be obtained from precedent. Fixing the fair rate therefore becomes a matter of judicial discretion, and there is no reason for holding that the learned Judge in the exercise of his discretion has in any way erred.

S. R. *S. As. Nos. 59 to 69 of 1929 allowed; S. As. Nos. 37 to 44 and 46 to 57 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Abdul Razak Saib .. *Appellant* (Defendant)*

v.

Zainab Bi .. *Respondent (Plaintiff).*

Abdul Razak Saib v. Zainab Bi.

Mahomedan Law—Gift—Delivery of possession—Joint possession by donor and donee—Overt act if necessary—Recital as to delivery of possession in registered deed of gift—Payment of Municipal tax by donee—Inference as to delivery of possession.

Under the Mahomedan Law a gift of immoveable property is invalid in the absence of delivery of possession by the donor to the donee. Where the donor and the donee live together at the time of the gift in the gifted property, there must be some evidence to show that possession was transferred by the donor. A mere registered deed effectuating the gift will not be evidence of such transfer; but if the deed shows that possession was intended to be transferred and that the donee has been put in possession also, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. In such a case it is not necessary for the donor to do any overt act to complete the gift.

Where a Mahomedan mother conveyed a dwelling-house by means of a registered deed of gift to her son and the deed contained a recital to the effect that the property had been delivered to the donee and the evidence showed that the donor and the donee continued to live in the house thereafter and the donee continued to pay the Municipal tax as before,

Held, that under the circumstances there had been such delivery of possession as the property was capable of and that the subsequent payment of the Municipal tax might be taken as a sufficient indication of transfer of possession so as to render the gift valid in law.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 200 of 1929 (A. S. No. 444 of 1928, District Court, North Arcot, at Vellore) preferred against the decree of the Court of the District-Munsif of Tirupattur in O. S. No. 715 of 1927.

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*Second Appeal No. 756 of 1930. 3rd August, 1932.

Abdul Razak Saib *v.* Zainab Bi.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for appellant.

B. Somayya and *P. Krishnamachari* for respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff, his mother, for the possession of a house on the ground that she was driven out of it by him and that the gift-deed executed by her in respect of it in his favour is not valid and binding. The subject-matter of the gift is a dwelling-house which the plaintiff, the donor, got from her second husband. The appellant, the donee, is her son by her first husband. Some time after the death of the appellant's father, the respondent was married by her second husband. He also died. The appellant lived with his mother in the suit house before the date of the gift. At the time of the gift and subsequently also they lived in the same house. On account of differences between her and her daughter-in-law, the plaintiff was forced to leave the house. In the pleadings and as shown by the issues, her case was that the suit document was brought about by fraud and undue influence, but it was also urged during the course of the trial, as may be seen from paragraph 15 of the Munsif's judgment, "that it had not been proved that possession had been duly given to the defendant at the time of the gift and that therefore the transaction has become incomplete and is void". On both the points the learned District Munsif found against the plaintiff and dismissed her suit. On appeal the learned Subordinate Judge first dealt with the question "Is the gift invalid for non-delivery of possession" and as on this point he found in favour of the plaintiff he did not consider the other question arising in the suit and consequently allowed the appeal and gave her a decree. The learned Judge based his decision on *Shed Ahamad* v. *Ibrahim*[1] in which Newbould, J., of the Calcutta High Court, stated that

"'in cases where the donor and the donee reside on the property, a gift of the property under the Mahomedan Law may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject-matter of the gift."

In this case the learned Judge pointed out that there was no overt act to indicate that the plaintiff has transferred possession of the property to the donee.

1. (1919) 52 I. C. 314.

Abdul Razak Saib v. Zainab Bi.

The facts relating to the transfer of possession which are borne out by the evidence are these: in the gift-deed there is a recital to the effect that the property has been delivered to the donee. At the time the deed of gift was executed the plaintiff is said to have stated that the donee was already in possession. The learned Judge stated that these facts do not show that there was a change of possession, as the donee and the donor lived together in the house at the time of the gift. Subsequent to the gift the house tax was being paid by the appellant. The learned Judge held that this fact also was of no importance as even before the gift he used to pay the tax and as nothing was produced by the appellant to show there was mutation of names in the house tax register subsequent to the date of the gift to indicate that possession has been delivered over to the donee.

On behalf of the appellant it is argued that, having regard to the relationship of the parties, the mere residence of the donor with the donee does not show that there was no transfer of possession, considering the fact that the gift had been made by means of a registered deed which recited that possession had been given to the donee and that all that could be done under the circumstances that was possible to show transfer of control of the house had been done in the case, and that therefore no overt act such as actual delivery of possession or mutation of names in the Municipal registers, etc., was necessary to make the gift a valid one. On behalf of the respondent it is contended that the joint residence shows that there has been no complete abandonment of possession by the donor and that, even if no actual delivery need be proved, there must be evidence to show that complete relinquishment of possession was made by the donor; and that the circumstances of the case do not show that there has been such complete relinquishment. A large number of cases was cited on either side in support of the respective contentions. I shall discuss these cases as it is clear that the question involved in this case cannot be dealt with as a pure question of fact; indeed it has not been so dealt with in any of the cases brought to my notice and the counsel for the respondent has also not asked me to deal with it in that way.

It is well settled that under the Mahomedan Law delivery of possession is necessary to make a gift of immoveable property valid but this does not mean—and this is not disputed by the learned counsel for the respondent—that physical departure

Abdul Razak Saib v. Zainab Bi.

or formal entry is necessary in the case of a gift of immoveable property in which the donor and the donee are both residing at the time of the gift. Ordinarily cases of this kind do not present much difficulty as clear evidence will be forthcoming to show there has been a transfer, such as mutation of names in favour of the donee in the revenue or other registers, or management and enjoyment of the property by the donee. Similarly there may be evidence of management of the property by the donor despite the gift to show that there has been no transfer. The difficulty arises only in cases where such evidence, one way or the other, is absent and these have to be scrutinised carefully especially so, when the point is not taken either in the pleadings or in the issues.

The gift deed, Ex. A, which is a registered document, runs as follows:—

> "Gift executed in favour of Abdul Razak Saheb by Zinubi Ammal . . . . The house described hereunder I have to-day given by way of gift and to-day I have put you in possession of the said house. Therefore you can happily enjoy the said house worth Rs. 500 from generation to generation with powers of gift, sale, etc., and all right to water, etc. Hereafter to the said house myself or my heirs shall have no manner of right or claim."

In the document the donor states clearly that on the date of the gift "I have put you (donee) in possession of the said house" and that the donor has no right or claim to it thereafter and that the donee may enjoy it for ever with all the rights of an owner. This is a solemn declaration made by the donor. There can be no doubt, so far as can be gathered from the document, that the donor's intention to transfer possession of the house to the donee is clear and that he has also stated in the document expressly that *she has put the donee in possession* thus effectuating her intention. In such a case, even though the donor and the donee lived together on the property at the time of the gift, can it be deduced from the decisions of Courts that there is sufficient delivery of possession in law and that actual transfer of physical possession is not necessary to complete the gift? This is the question I have to decide in this case. I shall now examine the cases and first deal with the decisions of our Court.

In *Bava Saib* v. *Mahomedi*[1] where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with

1. (1896) I. L. R. 19 Mad. 343.

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him in the house, it was held that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exceptions allowed by Muhammadan Law, these exceptions being, where the house gifted is given by a husband to a wife or by a father or guardian to his minor child or ward. This decision is very much relied on by the respondent, but two things must be noticed, namely, that the gift being an oral one, nothing could be inferred regarding the delivery of possession from the mere fact that there was a gift, and that in a subsequent decision in *Kandath Veettil Bava* v. *Musaliam Veettil Pakrukutti*[1] "the language of the Court" was stated to be "somewhat wide" and it was also stated that "the learned Judges only intended to suggest that the donor's possession after the alleged gift would be evidence that the gift was incomplete". No doubt in the latter case, the Court upheld the gift only because there was sufficient evidence to show there was transfer of possession but it must be remarked that no inference regarding the transfer of possession could be made in this case also as the records show (*see* District Munsif's judgment) that there was no document to evidence the Streedhanam grant. The decision in *Bava Saib* v. *Mahomed*[2] was not followed in *Alla Pichai Tharaganar* v. *Mahomad Moideen*[3] also. As already observed both in *Bava Saib* v. *Mahomed*[2] and in *Kandath Veettil Bava* v. *Musaliam Veettil Pakrukutti*[1] though there the gifts were proved, obviously nothing could be inferred regarding the intention of the donor or of the transfer of possession; but the same cannot be said about the case before us, the gift having been made by a registered document which shows the intention of the donor and says pointedly that the donee was put in possession. That in such a case actual transfer of physical possession is not necessary to complete the gift when the donor and the donee are living together on the property forming the subject-matter of the gift follows from the decision in *Humera Bibi* v. *Najm-un-nissa Bibi*[4] which is accepted as laying down the correct law by this Court in *Kandath Veettil Bava* v. *Musaliam Veettil Pakrukutti*[1] which I have referred to. In that decision the learned Judges, after referring to *Humera Bibi* v. *Najm-un-nissa Bibi*[4], stated that "we agree with the view

1. (1907) I. L. R. 30 Mad. 305 at 307. 2. (1896) I. L. R. 19 Mad. 343.
3. (1914) 23 I. C. 520. 4. (1905) I. L. R. 28 All. 147.

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therein adopted". The decision in *Humera Bibi* v. *Najm-un-nissa Bibi*[1] has been strongly relied on by the appellant. In that case a gift was made of some property by an aunt to her nephew. Both lived together in the house included in the gift deed at the time of the gift. In the document it was stated that the donor not merely made a gift of the property to the donee but also put him in proprietary possession of it. It also contained a further statement that the donee had accepted the gift and taken possession of the property. In addition to these statements in the document there was evidence to show that mutation of names was effected in favour of the donee. The validity of the gift was questioned 13 or 14 years after the gift, and there were other circumstances and evidence regarding plaintiff's conduct. No doubt there are strong circumstances which distinguish the case from the present one but, so far as the gift deeds are concerned, both the cases are alike except in this, that the gift deed in that case contained a statement that the donee had taken possession of the property also. In these circumstances, it was argued that, there being no transfer of possession of the house in which the parties resided as is necessary to satisfy the requirements of the Mahomedan Law, the gift was invalid. It is true that the decision is based on all the facts of the case but there is sufficient indication in the judgment to show that, apart from the special distinguishing features, the statements in the document formed the main basis of the learned Judges' decision. For they state as follows:—

"We are not prepared to hold that, in a case such as the present, actual physical departure of the donor from a house which is the subject of a gift evidenced by a written instrument is necessary in order to complete the gift by delivery and possession. On the contrary, we think that, if the parties are present on the premises, it is sufficient that an intention on the part of the donor to transfer the possession has been unequivocally manifested. There can be no doubt in this case that such an intention was unequivocally manifested. In the document itself it is expressly stated that the plaintiff not merely made a gift of the property to Minnat-ullah, but also put him into proprietary possession of it, and a further statement that Minnat-ullah had accepted the gift and taken possession of the property."

After stating thus they pointed out that in addition to this there was mutation of names, etc. Then they referred to the decision in *Shaik Ibhram* v. *Shaik Suleman*[2] in which the necessity for actual delivery in the case of a gift of a house in which the donor and donee lived at the time of the gift was

1. (1905) I. L. R. 28 All. 147. 2. (1884) I. L. R. 9 Bom. 146.

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considered. In that case the subject of the deed of gift was a dwelling-house in which the donor was residing at the time of the gift and continued to reside up to the time of the death along with the donee. The District Judge held that no relinquishment on the part of the donor had taken place and that the gift was therefore inoperative. The decision was set aside and the learned Judges observed as follows:—

"As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession . . . An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested."

After referring to these observations in *Shaik Ibhram* v. *Shaik Suleman*[1] the learned Judges in *Humera Bibi* v. *Najm-un-nissa Bibi*[2] referred to Amir Ali's book on Mahomedan Law and pointed out that the learned author did not disapprove of that decision. I think the decision in *Shaik Ibhram* v. *Shaik Suleman*[1] strongly supports the appellant. This decision may be said to be impliedly accepted in this Court as it has expressly accepted *Humera Bibi* v. *Najm-un-nissa Bibi*[2] which relies on this decision. Both these cases and *Bava Saib* v. *Mahomed*[3] have been referred to in *Vahazullah Sahib* v. *Boyapati Nagayya*[4] but they have not been discussed as a finding was called for "as regards the transmutation of possession". The decision in *Rahiman Bi* v. *Mahomed Fatima Bibi*[5] is not much helpful as it discusses the question of law only generally and as it dealt with the gift of a house by a father to his minor son which involves the application of certain special presumptions under the Mahomedan Law. Coming to the recent decisions of this Court in *Ajagar Hazar Saheb* v. *Annammah*[6] with regard to the argument that, inasmuch as the donor lived with the donee, it must be held that he did not deliver possession to her. Mr. Justice Devadoss observed as follows and these observations in my opinion may well be applied to the present case:—

"We have to see what the intention of the donor is. From Exhibit B it is quite clear that he divested himself of all his property and that he

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1. (1884) I. L. R. 9 Bom. 146.
2. (1905) I. L. R. 28 All. 147.
3. (1896) I. L. R. 19 Mad. 343.
4. (1907) I. L. R. 30 Mad. 519: 17 M. L. J. 562.
5. (1914) 23 I. C. 651.
6. A. I. R. 1927 M. 572.

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wanted to be maintained by the plaintiff. That being so, can it be reasonably contended that his mere living in the house meant that she had no possession of the house? *When a man makes a gift of property to a near relation who is living with him, the mere fact that he happens to live with him after the gift is made is not a sufficient circumstance to hold that possession did not pass.* (The italics are mine.) Each case would depend upon its circumstances. If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happens to live after the date of the gift with the donee in the house which is the subject of the gift would not by itself entitle the Court to hold that possession had not passed and that possession remained with the donor"

and then the learned Judge proceeded to consider the evidence which also showed that there must have been effective transfer of possession. The decision in *Muhammed* v. *Ummanaikani Ammal*[1] strongly supports the appellant. In that case the gifts were of portions of the family dwelling-house in which the parties have all along been living. The learned Judge, Wallace, J., held that actual divesting by the donor and delivery to the donee was not necessary in this case, such possession as is suitable and possible in the circumstances having been given. In the case of one of the deeds the donee was a minor and this fact was referred to as an additional reason for holding that the intention to give declared in the deed was sufficient to hold that there was delivery. This consideration does not affect the present case. This was only an additional reason given in one of the cases. I do not think that the Madras decisions compel me to hold that in the case of a gift of a dwelling-house in which the donor and the donee who are close relations lived together at the time of the gift, it will be necessary for the donee to prove an overt act on the part of the donor to show that there has been a transfer of possession to validate the gift under the Mahomedan Law, when the document shows an intention on the part of the donor to divest himself of possession and contains an explicit statement that the donee has been put in possession and nothing to the contrary has been proved by the donor. Each case must be decided with reference to its own circumstances. None of the decisions I have examined is opposed to the appellant's contention; on the other hand one of them, *Muhammed* v. *Ummanaikani Ammal*[1], distinctly supports him, whilst another *Ajagar Hazar Saheb* v. *Annammah*[2], contains observations directly applicable to the present case.

Now, coming to the decision of the other High Courts, I have already referred to a decision of the Allahabad High

1. A. I. R. 1930 Mad. 593. 2. A. I. R. 1927 Mad. 572.

Court and to one decision of the Bombay High Court. Two other decisions of the Bombay High Court may also be referred to: *Abdul Majid Khan* v. *Husseinbu*[1] and *Musa Miya* v. *Kadar Bux*[2]. The first is relied on by the appellant and the other, which is a Privy Council decision, by the respondent. In *Abdul Majid Khan* v. *Husseinbu*[1] the decision in *Shaik Ibhram* v. *Shaik Suleman*[3] was followed; but it was observed that it does not follow in every case necessarily that where two are present, possession must be deemed to have been transferred. The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case and in that case it was pointed out that the evidence at the trial definitely showed that there was no transfer of possession. In the case before us there being no such evidence, the decision in *Shaik Ibhram* v. *Shaik Suleman*[3] may well be applied. The decision in *Musa Miya* v. *Kadar Bux*[2] is not helpful as it related to an oral gift and the absence of delivery of possession was sought to be explained by relying on an exception to the general rule. The donor in that case was the grandfather and the donee the grandson. It was observed by their Lordships that the general rule of Mahomedan Law that a gift is invalid in the absence of delivery of possession is subject to an exception in the case of a gift to a minor by his father or guardian. But this exception should be strictly construed. It does not extend to a gift by a grandfather to his minor grandsons if their father is alive and has not been deprived of his right and powers as guardian, even though the minors have always lived with the grandfather and have been brought up and maintained by him.

In *Dalpheroo Mian* v. *Bangali Mali*[4] the Patna High Court while affirming the general rule that in order to complete the gift under Mahomedan Law the donor must even if only for a time abandon possession of the property gifted in favour of the donee referred with approval to the decision in *Shaik Ibhram* v. *Shaik Suleman*[3] but in the case before them the learned Judges held that the transfer of possession was not proved because "beyond the written deed of gift there is no such un-

1. (1919) 55 I. C. 952.
2. (1928) L. R. 55 I. A. 171: I. L. R. 52 Bom. 316: 54 M. L. J. 655 (P.C.).
3. (1884) I. L. R. 9 Bom. 146.
4. (1922) 71 I. C. 897.

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equivocal intention manifested; on the contrary, the donor soon after the deed of gift, joined in mortgaging the house" which was the subject-matter of the gift. The contents of the document are not mentioned in the judgment but it is clear that they did not give effect to the intention if any was expressed in it because the evidence showed that the donor had acted contrary to such intention. Probably beyond the *bare deed* there was nothing to support delivery of possession in that case. In the case before us, as I have already said, the document states that the donee was put in possession and there is no evidence on the part of the donor that she acted in a way which will show that she did not part with possession as in the Patna case.

The appellant next relied on *Rahmat Ali* v. *Daulat Bibi*[1], a decision of the Lahore High Court. This decision is very much like the present case. After discussing the case-law on the subject it was held that actual transfer of physical possession is not necessary to complete a gift in cases where the donor and the donee live in the gifted house. The fact that "the donor continued to live in the same house for about a month after the date, of the gift which he had made by means of a registered deed, does not show that possession was not given to the donee *where it is so expressly stated in the deed*". (The italics are mine) (see the head-note).

Mr. Somayya for the respondent besides relying on those of the above-mentioned cases which seem to support him relied also on paragraph 127 of Mulla's Muhammadan Law, the third paragraph of which dealing with delivery of possession of immoveable property *where the donor and the donee both reside in the property* states as follows:—

"No physical departure or formal entry is necessary in the case of a gift of immoveable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift."

The cases given in support of this proposition are *Shaik Ibhram* v. *Shaik Suleman*[2] and *Abdul Majid Khan* v. *Husseinbu*[3]. I have examined above, both these cases and have shown that the law stated in one of them regarding the delivery of the house in that case distinctly supports the appellant; in the other case the learned Judges held that it was distinguishable

1. A. I. R. 1925 Lah. 501. 2. (1884) I. L. R. 9 Bom. 146.
3. (1919) 55 I. C. 952.

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from the decision in *Shaik Ibhram* v. *Shaik Suleman*[1] and that the question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. These cases affirming the general principle that in order to complete a gift some overt act on the part of the donor is necessary, to show how in special cases, circumstances may render the general principle inapplicable. The appellant does not contend against the general proposition of law stated in the book but what he says is that the law being what is stated therein, in a case like the present, effect should be given to the intention of the donor clearly indicated in the gift deed and to the express statement contained in it that the donee has been put into possession. This contention is supported by abundant authority.

Having regard to the decisions which I have discussed, my conclusions so far as they relate to this case are these:

(*a*) that a gift of immoveable property under Mahomedan Law is invalid in the absence of delivery of possession by the donor;

(*b*) where the donor and the donee live together at the time of the gift in the gifted property, there must be some evidence to show that possession was transferred by the donor;

(*i*) a mere registered deed evidencing the gift will not be evidence of such transfer; but

(*ii*) if the deed shows that possession was intended to be transferred and that the donee has been put in possession also, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. In such a case it is not necessary for the donor to do any overt act to complete the gift.

These conclusions are supported by the decisions in *Shaik Ibhram* v. *Shaik Suleman*[1], *Abdul Majid Khan* v. *Husseinbu*[2], *Rahmat Ali* v. *Daulat Bibi*[3], *Humera Bibi* v. *Najm-un-nissa Bibi*[4] and *Dalpheroo Mian* v. *Bangali Mali*[5]. I do not think that the Madras decisions brought to my notice are opposed to these conclusions; on the other hand two of them clearly support them.

1. (1884) I. L. R. 9 Bom. 146.
2. (1919) 55 I. C. 952.
3. A. I. R. 1925 Lah. 501.
4. (1905) I. L. R. 28 All. 147.
5. (1922) 71 I. C. 897.

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I have already referred to the general features of this case, but to one fact I wish especially to draw attention. In my opinion, the learned Judge has not attached sufficient importance to it. The defendant has been paying the Municipal tax for the house after the gift. It is true that he used to pay it even before the gift but it was not right on this ground to ignore the significance of the subsequent payment in the face of the express statement in the document that the defendant has been put in possession of the house. That being so, the right way to construe the subsequent conduct of the defendant is in the light of that statement. In this case, I think in the light of Ex. A, payment of Municipal taxes by the defendant subsequent to the gift may be taken as a sufficiently clear indication that transfer of possession has been made by the donor. If so, there is no difficulty in the case at all. Even without relying on this item of evidence, I have already shown that there has been such transfer of possession in this case as would validate the gift under the Muhammadan Law. Having regard to the relationship of the parties the mere residence of the donor with the donee does not show that there was no transfer of possession. In my opinion all that could be done under the circumstances to show there was transfer of possession has been done in this case; and that in a case like the present, an overt act on the part of the donor is not necessary to complete the gift. The decision relied on by the learned District Judge *Shed Ahamad* v. *Ibrahim*[1] is distinguishable as we know nothing about the contents of the "Lebanama" in that case; probably it mentioned the bare fact of gift and contained nothing about the intention of the donor, possession by the donee, etc.

For the above reasons I would hold that the learned Judge's decision is wrong on the first point. It follows therefore that the case cannot be decided without a finding on the second point which has not been dealt with by him and which in my opinion is the substantial point in the case. I would therefore call upon the learned Subordinate Judge to submit a finding on point No. 2 noted in his judgment, namely, "Is the gift vitiated by fraud, misrepresentation or undue influence?" The finding is to be submitted within four weeks after the receipt of this order; time allowed for objections is ten days.

1. (1919) 52 L C. 314.

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[In pursuance of the above order the Lower Appellate Court submitted a finding to the effect that Ex. A was not vitiated by fraud, misrepresentation or undue influence.]

The case coming on for final hearing after the return of the finding the Court delivered the following

JUDGMENT.—I accept the finding of the Lower Court. The learned Judge distinctly finds that the executant of the document had independent advice. The result is this second appeal is allowed and the plaintiff's suit is dismissed with costs here and in the Court below.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

P. Rama Naidu (deceased) and others .. *Appellants* (Plff. and his L. Rs.)*

v.

Rangayya Naidu and others .. *Respondents (Defendants 2 to 4).*

Rama Naidu *v.* Rangayya Naidu.

Probate—Application by executor under will—Representative character of proceeding—Death of applicant during pendency of proceeding—Right of sons interested in will to intervene—Civil Procedure Code, 1908, O. 22.

A proceeding for the grant of probate or letters of administration with a copy of the will annexed is a representative action and the fact that the applicant asserts a personal right, namely, the right to executorship, does not alter its representative character. Where the executor applying for probate dies during the pendency of such a proceeding either in the trial Court or in the Court of appeal, his sons, who claim as legatees or as representatives of the deceased legatee, can intervene and continue the proceeding. This is independent of the sons' right, if any, to be impleaded as legal representatives under O. 22, Civil Procedure Code.

Williams on Executors, 12th Edition, Vol. I, p. 213, *Bittleston* v. *Clark,* (1755) 2 Lee 248: 161 E. R. 330 and *Hayle* v. *Hasted,* (1836) 1 Cur. 236: 163 E. R. 80, relied on.

Sarat Chandra Banerjee v. *Nani Mohan Banerjee,* (1909) I. L. R. 36 Cal. 799 and *Haribhusan* v. *Manmatha Nath,* (1918) I. L. R. 45 Cal. 862, distinguished.

Mussamat Phekni v. *Mussamat Manki,* (1929) I. L. R. 9 Pat. 698 and *Sachindra Nath Maity* v. *Bepin Behari Sasmal,* (1931) 35 C. W. N. 1028, referred to.

Appeal against the decree of the District Court of Chingleput in O. S. No. 5 of 1927.

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*C. M. A. No. 294 of 1928. 19th August, 1932.

Rama Naidu v. Rangayya Naidu.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *M. Venkatasubbayya* for appellants.

S. Varadachariar and *R. Rajagopala Aiyangar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—One Rama Naidu applied in the Lower Court for probate of the will of the deceased. Certain persons entered a caveat and the proceeding became a contentious one. The Lower Court, holding that the will has not been proved to be genuine, refused probate and Rama Naidu filed the present appeal and died before the hearing. His sons have been brought on the record and an objection has been taken as to their legal competence to prosecute the appeal, and that is the first question we have to decide.

Rama Naidu besides being the executor is also the residuary legatee. We cannot as a Court of probate decide questions of construction; but it is not disputed that, in any view, Rama Naidu's sons would be beneficiaries. If the estate taken by the deceased was an absolute one, his sons, on his death, become entitled to the legacy as his heirs; if, on the other hand, the bequest is to be construed as conferring on him only a life estate, the sons, by reason of the words "his male descendants," would take the legacy in their own right. In either case, the sons of Rama Naidu are persons entitled to a benefit under the will.

The decision on the point raised depends upon the view the Court takes of the true nature of the sons' application. Is that to be regarded as an application under *O. 22*, Civil Procedure Code? Is it necessary for the sons to make out that the right to sue in such a proceeding *survives* and that they are their father's *legal representatives*? An applicant under *O. 22, R. 3*, must establish these two positions first, that the right to sue survives, secondly, that he is the plaintiff's legal representative. If the original plaintiff in filing the petition in his character as executor represented *the estate* of the deceased testator, then, on his death, his right may fairly be said to have devolved upon his sons. This follows from the construction which the Judicial Committee was disposed to place in *Venkatanarayana Pillai* v. *Subbammal*[1] upon the expression "legal

1. (1915) L. R. 42 I. A. 125: I.L.R. 38 Mad. 406: 28 M. L. J. 535 (P. C.).

representative" when a contingent reversioner applied to be substituted in appeal in the place of the deceased presumptive reversioner. But, in my opinion, this is an inquiry which need not be pursued, for the applicant's right stands independent of *O. 22*, and this position, if realised, will clear the way of much irrelevant discussion.

The question is not, have the applicants a right to be substituted?; but is much more fundamental, have they a right to intervene at any stage of the proceedings? If they can come in at any time, the fact that the original petitioner has died can be of no consequence. Nor does it in principle make any difference whether they seek to intervene before or after the judgment was rendered by the first Court. The question then resolves itself into this: Is a proceeding for the grant of probate (or Letters of Administration with a copy of the will annexed) a representative one; in other words, is the person who has commenced it to be regarded as having done so in his representative or merely individual character? In considering this question, there are two distinct matters which must not be confused. The right which a petitioner in such a proceeding asserts is in one sense an individual or a personal right. But because he asserts a *personal right*, the proceeding does not become one for his *personal benefit*. An executor applies for probate, for instance, on the strength of his special right, which he derives from his appointment under the will. But is the proceeding on that account to be regarded as having been initiated by him in his individual character? He may often possess no beneficial interest and his right may rest on no more than a bare legal title. The proper view to take is, that his object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others, that the will propounded is genuine and valid. In inviting the Court to pronounce in favour of the will, the executor is acting in a representative capacity, that is to say, for the benefit of the whole class of persons, including himself, interested in having it established. The position of a petitioner for probate is not dissimilar to that of a plaintiff under *O. 1, R. 8, Civil Procedure Code*. What the rule contemplates is a common interest and in the case of a petition for probate, there is an identity of interest on the part of the whole body of persons claiming under the will. One of the necessary incidents of a representative suit is,

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that any person for whose benefit it is instituted my intervene and ask to be made a party. *O. 1, R. 8, cl. (2)*. If a petition for probate stands on a footing similar to that of a representative suit, it is right in principle to extend the analogy and hold that any legatee or beneficiary may, on a proper case being made out, intervene at any stage and claim to come on the record. True, an executor when applying for probate does not purport to act under *O. 1, R. 8*. This remark applies equally to a presumptive reversioner who brings a suit in the lifetime of a Hindu widow for getting rid of an adoption or an alienation made by her. Nevertheless, the Judicial Committee has held in the case relied upon by the learned Advocate-General, *Venkatanarayana Pillai* v. *Subbammal*[1], already cited, that on the death of the presumptive reversioner, the person next entitled to the reversion can be substituted in his place, on the ground that the presumptive reversioner's suit must be deemed to be a representative one. In that case, the Judicial Committee refrained from deciding whether or not the adjudication in such a suit would operate as *res judicata* against the contingent reversioners not parties *eo nomine* to the action. But in a later case in *Kesho Prasad Singh* v. *Sheo Pragash Ojha*[2] they point out that from the view taken by them in the earlier case, (*Venkatanarayana Pillai's case*[1]) the conclusion necessarily follows that the judgment in the presumptive reversioner's suit is binding even as between the persons not directly parties to the previous suit.

The two questions, the right to intervene and the binding character of the judgment as *res judicata*, are, as Mr. Varadachari rightly points out, interdependent.—Are the legatees entitled to intervene? If they are, the judgment given in their absence would be binding upon them as *res judicata*. Does the adjudication operate as *res judicata*? If it does, surely, they would have a right to intervene, for it would be unjust to hold that they would be bound by the judgment and yet deny to them the right of intervention. *Explanation 6 to S. 11, Civil Procedure Code*, recognises this principle and provides that judgments in representative actions bind also persons who are constructively parties.

1. (1915) L. R. 42 I. A. 125: I. L. R. 38 Mad. 406: 28 M. L. J. 535 (P. C.).
2. (1924) L. R. 51 I. A. 381: I. L. R. 46 All. 831: 47 M. L. J. 824 (P. C.).

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Mr. Varadachari for the respondents relies principally upon two cases of the Calcutta High Court. In *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*[1] the application for the grant was made by the residuary legatee who died pending the suit. On his death, his widow applied for being substituted. In refusing her request, Harrington, J., observes that the right to represent the estate has not devolved upon her. This case was followed by Greaves, J., in *Haribhusan* v. *Manmatha Nath*[2]. It was the son of the original applicant, the residuary legatee, that applied to be made a party, and his application was similarly rejected. In these two cases, the question was not presented to the learned Judges in the form in which we are now considering it. The only contention put forward was, that the applicants were entitled to be substituted under *O. 22, R. 3.* It was not argued that they had a larger right flowing from the nature of the proceeding, namely, a right to intervene at any stage. *Mussamat Phekni* v. *Mussamat Manki*[3], on which the applicants rely, supports their contention. The facts in that case were similar to those in the present and it was held that the heir could be substituted. The conclusion although based on a ground different from what we are adopting seems, in my opinion, sound. This remark applies to another case relied on by the applicants, *Sachindra Nath Maity* v. *Bipin Behari*[4], where also on the death of the legatee who applied for probate, her representatives were substituted. Apart from authority, I am satisfied on principle that the sons of Rama Naidu have been properly brought on the record. In the course of the argument, my learned brother drew attention to a passage in Williams on Executors, which most clearly and unequivocally supports my view. I shall extract that passage:

> " A legatee cannot set up a will after it has been litigated between the executor and next-of-kin, or between the executor and the executor of another will, and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion. But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit, but apparently not after the hearing."

Williams on Executors, 12th Ed., Vol. I, p. 213.

A further question was raised and argued, whether a judgment of a Probate Court, if against a will, amounts or not to a judgment *in rem under S. 41* of the Indian Evidence

1. (1909) I. L. R. 36 Cal. 799.
2. (1918) I. L. R. 45 Cal. 862.
3. (1929) I. L. R. 9 Pat. 698.
4. (1931) 35 C. W. N. 1028.

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Act. On this point, several cases, such as *Chinnasami* v. *Hariharabadra*[1], *Kalayanchand Lalchand* v. *Sitabai*[2], *Saroda Kanto Doss* v. *Gobindo Mohan Das*[3] and *Ramani Debi* v. *Kumud Bandhu Mukerji*[4] have been cited at the bar, but in the view I have taken, it becomes unnecessary to deal with that question and I, therefore, refrain from dealing with it.

In the result, I have come to the conclusion that Rama Naidu's sons have been rightly brought on the record and are entitled to prosecute the appeal.

I shall now deal with the appeal on the merits.

[His Lordship after considering the evidence held that the will was proved and concluded :]

In the result, the appeal is allowed with costs throughout.

The District Judge is accordingly directed to issue under the provisions of the Indian Succession Act, Letters of Administration with a copy of the will annexed to the appellants (the sons of Rama Naidu) or any of them as the District Judge may in his discretion think fit.

Reilly, J.

Reilly, J.—I agree with my learned brother that it is unnecessary on this occasion to express an opinion on the question whether a judgment refusing probate of a will is a judgment ***in rem***, though that question was argued before us at some length. On that question there is a conflict between the view expressed in this Court and the Calcutta High Court on the one hand and that of the Bombay High Court on the other. If Rama Naidu, the Plaintiff, when he sought to prove the will in his suit for probate, was not only asserting his claim to be recognised as executor but can be regarded as seeking to establish the will as representing all the beneficiaries under it, then on his death any other beneficiary represented by him or any person succeeding to a benefit under it through his death could continue the proceedings either in the original Court or on appeal, though the prayer for probate would in those circumstances necessarily be changed to one for letters of administration with the will annexed. Representative suits in this country, in which those who are by name on the record fight the battles and represent the interests, not only of them-

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1. (1893) I. L. R. 16 Mad. 380: 3 M. L. J. 121.
2. (1913) I. L. R. 38 Bom. 309.
3. (1910) 12 C. L. J. 91.
4. (1910) 12 C. L. J. 185.

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selves, but also of others, who are in effect, though not in name, parties to the suits from the beginning, are not confined to suits in which permission to represent other persons has been obtained under R. 8 of O. 1, Code of Civil Procedure. That was recognised by their Lordships of the Privy Council in regard to Hindu reversioners in *Venkatanarayana Pillai* v. *Subbammal*[1], *Janaki Ammal* v. *Narayanasami Aiyar*[2] and *Kesho Prasad Singh* v. *Sheo Pragash Ojha*[3], in regard to members of the public interested in a public trust of a religious and charitable nature in *Raja Ananda Rao* v. *Ram Das Daduram*[4] and in regard to worshippers in a temple in *Sankaralinga Nadan* v. *Rajeswara Dorai*[5]. In England that principle was long ago applied to probate proceedings. In 1755 in *Bittleston* v. *Clark*[6] Sir George Lee said:

> "A legatee cannot set up a will after it has been litigated between the executor and next-of-kin and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion, and so the Delegates held in *Lewis* v. *Bulkeley*[7] but a legatee, if he is afraid the executor will not do justice, may intervene in his own interest,"

which is in effect quoted in the passage taken by my learned brother from Williams on Executors. In 1836 in *Hayle* v. *Hasted*[8] Sir Herbert Jenner described executors who prayed for probate of a will and codicil as "in effect representing and protecting the interests of all the parties benefited under those instruments". Mr. Varadachariar contended that, when an executor prays for probate, he prays for something which is personal to himself, as no one but an executor can get probate. That is to look at the mere form of the proceedings and to ignore their real effect. As Sir Herbert Jenner said in the same case, "the executors in the former will represent and are the protectors of the legatees under it, being specially entrusted by the deceased with the care and management of her property and to see her intentions carried into effect" and again "the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate and which they must be

1. (1915) L. R. 42 I. A. 125: I. L. R. 38 Mad. 406: 28 M. L. J. 535 (P.C.).
2. (1916) L. R. 43 I. A. 207: I. L. R. 39 Mad. 634: 31 M. L. J. 225 (P. C.).
3. (1924) L. R. 51 I. A. 381: I. L. R. 46 All. 831: 47 M. L. J. 824 (P.C.).
4. (1920) L. R. 48 I. A. 12: I. L. R. 48 Cal 493 (P.C.).
5. (1908) L. R. 35 I. A. 176: I. L. R. 31 Mad. 236: 18 M. L. J. 387 (P.C.).
6. (1755) 2 Lee 248: 161 E. R. 330.
7. (1732) 1 Lee 513 notes: 161 E. R. 189.
8. (1836) 1 Curt. 236: 163 E. R. 80.

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taken to have considered as containing the last will of their testator and which as such it was their duty to see carried into effect; for it is not the interest of the executors but the intention of the testator which is to be attended to." It cannot be denied that the passages I have quoted represent the law in England to-day. An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fails in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed. There is no reason to doubt that the position is the same in this country. This aspect of the matter, I think it is clear, was overlooked in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*[1] and *Haribhusan* v. *Manmatha Nath*[2] on which Mr. Varadachariar relies, where the positions before the Court were dealt with as if the only question arising was how O. 22 of the Code applied to them. I agree that Rama Naidu's sons are entitled to prosecute his appeal against the dismissal of his suit to establish the will.

[His Lordship proceeded to deal with the facts and upheld the will.]

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

M. K. Panduranga Mudali .. *Petitioner* (1st Accused).*

Panduranga Mudali, *In re.*

Press (Emergency Powers) Act (XXIII of 1931), S. 18 (1)—Unauthorised news-sheet—Painting words " Boycott British goods " on the road—Ordinance V of 1932, S. 3 (b), as amended by Ordinance VII of 1932—" Molestation "—Test of offence—Criminal Law Amendment Act (XIV of 1908), S. 17 (1)—" Assists "—Meaning of.

" A view to cause loss " is, under S. 3 (*b*) of Ordinance V of 1932 as amended by Ordinance VII of 1932, the essence of the offence of molesta-

*Cr. R. C. No. 403 of 1932. 26th September, 1932.
Cr. R. P. No. 372 of 1932.

1. (1909) I. L. R. 36 Cal. 799. 2. (1918) I. L. R. 45 Cal. 862.

tion but the words " Boycott British goods " cannot be supposed to incite the public to entertain the view to cause loss to the dealers in those goods and painting those words on the road does not amount to making an unauthorised news-sheet as defined in S. 2 (6), and does not constitute an offence under S. 18 (1) of the Press (Emergency Powers) Act (XXIII of 1931).

Held, however, that there was evidence in the case sufficient to justify the Magistrate's finding that in so doing, the accused was guilty of an offence under S. 17 (1) of the Criminal Law Amendment Act.

The word "assists" in S. 17 (1) of the Criminal Law Amendment Act means " intentionally assists".

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 and S. 107 of the Government of India Act praying the High Court to revise the judgment of the Fourth Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, in Calendar Case No. 9526 of 1932.

K. S. Jayarama Aiyar for *T. S. Venkatraman* for petitioner.

T. S. Anantharaman for Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was the first accused in the case tried by the learned 4th Presidency Magistrate, Madras. The case against him was that at 4 A.M. on the 5th April, 1932, he instigated the 2nd accused to paint on the surface of the road the words " Boycott British goods". In consequence of his abetment, and in his presence, accused 2 painted the word " Boycott" on the road, and then was arrested by a Head Constable of the C.I.D. He has been convicted of offences punishable under S. 17 (1) of the Criminal Law Amendment Act (XIV of 1908) and under S. 18 (1) of the Indian Press (Emergency Powers) Act (XXIII of 1931), and has been sentenced for each offence to six months' rigorous imprisonment and a fine of Rs. 100, the sentences to run concurrently.

It is contended in the first place that on the facts found the petitioner could only have been found guilty of abetment of the offences if any committed by the second accused. He was not charged with abetment, but with the actual offences. Hence, it is contended, the convictions cannot be maintained. This argument is unsound. S. 114, Indian Penal Code, provides that whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence. It follows that if the act of the second accused,

Panduranga Mudali, *In re.*

committed in consequence of the abetment of the petitioner, amounts to the offences charged, the petitioner also must be deemed to have committed the same offences. There is therefore no illegality in the charge, and the convictions cannot be set aside on this ground.

The next contention is that that facts found proved do not amount to an offence under S. 18 (1) of the Indian Press (Emergency Powers) Act. That section reads as follows (omitting the words which are unimportant in this case) :—

"Whoever makes . . . . . any unauthorised news-sheet . . . . . . shall be punishable with imprisonment which may extend to six months, or with fine, or with both."

The learned Presidency Magistrate has held that painting the words "Boycott British goods" on the surface of a public road amounts to the making of an unauthorised news-sheet. "News-sheet" is defined in S. 2 (6) as meaning "any document other than a newspaper containing public news or comments on public news or any matter described in sub-sec. (1) of S. 4". "Documents" in S. 2 (2) is said to include also "any painting, drawing or photograph or other visible representation". It follows quite clearly that painting words on the road is making a "document". The further question is whether the words "Boycott British goods" are matter described in sub-sec. (1) of S. 4. The offensive matter against which S. 4 (1) is directed is "words . . . . . . which

(*a*) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence."

It cannot of course be said that the words "Boycott British goods" incite to the commission of murder, but the learned Presidency Magistrate holds that they incite the public to commit the offence of ***molestation*** as defined in S. 3 (*b*) of Ordinance V of 1932 as amended by Ordinance VII of 1932. That section declares that a person is said to molest another person who "with a view to cause loss or knowing that loss is likely to be caused to such other person, loiters at or near the place where such person carries on business and dissuades or attempts to dissuade by words or gestures or otherwise any person from entering or approaching or dealing at such place". This appears to me to be altogether too far-fetched. Molestation can only be committed by somebody who loiters with a view to cause loss to a person carrying

on business. I do not see how the words "Boycott British goods" can be supposed to incite the public to entertain the "view to cause loss" which is the essence of the offence of molestation. The words can be held to inculcate a hatred of British goods, but I do not see that they necessarily inculcate a hatred of the people who deal in them, or a desire to do harm and cause loss to the people who deal in them.

I am of opinion therefore that though painting the words "Boycott British goods" on the roadway does amount to making a document, it does not amount to making an unauthorised news-sheet as defined in S. 2 (6) of the Indian Press (Emergency Powers) Act. It follows that the petitioner cannot be held to be guilty of an offence under S. 18 (1) of that Act.

It is contended on his behalf that he is not guilty under S. 17 (1) of the Criminal Law Amendment Act either. That section reads as follows:—

"Whoever is a member of an unlawful association or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both."

The learned Presidency Magistrate has held that by painting the words "Boycott British goods" on the roadway, the petitioner and the other who was convicted with him assisted the operations of the Working Committee of the Indian National Congress, which is an unlawful association. Mr. Jayarama Aiyar for the petitioner argues that it has not been properly proved (*i*) that the Working Committee of the Congress is an unlawful association, (*ii*) that one of the operations of the Working Committee consists in inciting people to boycott British goods, or (*iii*) that the petitioner has assisted such an operation. I cannot accept these contentions. If it were necessary I would be prepared to hold that any Court may take judicial notice of the facts that the Congress is an unlawful association and that one of its operations consists in incitement to boycott British goods. In this case it is not necessary. There is the evidence of the Sub-Inspector (P. W. 5) that the Working Committee of the Indian National Congress has been declared an unlawful association, and that the boycott of all foreign cloth whether British or from other countries is enjoined by the Working Committee as one of the

means of furthering the Civil Disobedience Movement. The Sub-Inspector produced Ex. D, but I do not read his evidence as meaning that he derived his knowledge of these matters from Ex. D. He has also said that this boycott programme is being carried on by writing on walls and roads appealing to people to boycott British and foreign goods. He has said that the items of the programme of the Working Committee are being carried on by the Madras District Congress Committee, that the petitioner was a member of the Madras District Congress Tamil Committee and that he was a Congress worker. This evidence if believed was in my opinion quite sufficient to justify the learned Magistrate's finding that the petitioner was "assisting the operations of an unlawful association" within the meaning of S. 17 (1) of the Criminal Law Amendment Act of 1908. I do not overlook the principle that in S. 17 (1) the word "assists" must be construed in a reasonable way. That section is obviously not designed to punish persons who, acting quite innocently, happen by accident to do something which furthers the operation of an unlawful association. "Assists" in that section must, I think, mean "intentionally assists," *i.e.*, does something which assists with the intention of assisting. Construing the word in that liberal way, I hold that there was before the learned Magistrate enough evidence to justify the finding that the petitioner assisted the operations of an unlawful association.

I decline to entertain the contention that as no more than the word "Boycott" had been painted, the petitioner and the second accused had not passed the stage of "preparation" to commit an offence. It is, of course, possible to argue that the accused, after completing the word Boycott, might have changed their minds and gone on to add prostitution, gambling, drunkenness, or any other vice. But such an argument could not in this case be advanced seriously; by way of a joke it was quite amusing.

The result is that the conviction and sentence for an offence under S. 18 (1) of the Indian Press (Emergency Powers) Act are set aside; the fine if collected must be refunded. I find no ground for interference with the conviction and sentence under S. 17 (1) of the Criminal Law Amendment Act.

S. R. *Conviction set aside in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Govindaraja Pillai and others .. *Appellants** (*Plffs. 2 to 4*)

v.

Mangalam Pillai and another .. *Respondents* (*Defts. 2 and 3*).

Govindaraja Pillai *v.* Mangalam Pillai.

Hindu Law—Pre-nuptial settlement—Construction of—Absolute estate subject to defeasance clause, whether permissible—Gift over clause when void as repugnant—Devisee's right not affected by donee's alienation or compromise—Subsequent adoption by husband not divesting estate vested on wife's death.

A pre-nuptial settlement by a husband in favour of his wife was in the following terms:—"I have accordingly given you the undermentioned properties valued at Rs. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers should take the properties." Subsequent to this settlement in a litigation between the husband and wife in respect of settlement of properties, a razinama decree was passed whereby they divided the properties in certain shares to be enjoyed by them absolutely. The wife pre-deceased the husband who two months thereafter adopted a son. The wife's brothers claimed the properties under the gift over clause in the original settlement deed on the happening of the contingency, namely, the wife dying issueless.

Held, (1) that where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

Sreemutty Soorjeemoney Dossee v. *Denobundoo Mullick*, (1857) 6 M. I. A. 526; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, (1862) 9 M. I. A. 123 and *Lakshminarayana Nainar* v. *Valliammal*, (1910) I. L. R. 34 Mad. 250, followed.

Sarajubala Debi v. *Jyotirmayee Debi*, (1931) L. R. 58 I. A. 270: I. L. R. 59 Cal. 142: 61 M. L. J. 501 (P. C.), referred to.

Sures Chandra Palit v. *Lalit Mohan Dutta*, (1915) 31 I. C. 405, distinguished.

Distinction between repugnant clauses which are void and defeasance clauses which are valid pointed out.

(2) that the compromise by the wife being no more than an alienation could not be operative beyond her lifetime so as to affect the rights of the subsequent devisees, and

(3) that the subsequent adoption after the death of the donee did not operate to divest the estate vested in her brothers, as the contingency contemplated was only the death of the donee without issue at the time of her death.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 65 of 1928 (A. S. No. 17 of 1928, District Court, South Arcot) preferred against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 673 of 1924.

B. Sitarama Rao and *J. R. Gundappa Rao* for appellants.

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*S. A. No. 712 of 1930. 2nd August, 1932.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by plaintiffs 1 and 2 to recover possession of the plaint mentioned properties, alleging that they became entitled to the same on the death of their sister Madurambal in 1924 without any issue. The 1st defendant is the husband of Madurambal. When he married her, he was a man of advanced age, and at the instance of the parents of the girl he executed a registered settlement deed, Ex. A, on 2nd June, 1916, in favour of the girl. The material portion of Ex. A runs thus:

> "I have accordingly given you the undermentioned properties valued at Rs. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers (plaintiffs 1 and 2) should take the properties."

The plaintiffs' case is that their sister Madurambal having died without any issue the properties covered by Ex. A devolved on them and therefore they are entitled to recover possession of the same. The first Court was of opinion that the intention of the donor (1st defendant) was to confer only a life estate on Madurambal and the gift over in favour of plaintiffs 1 and 2 became operative on the happening of the specified contingency, namely, the death of Madurambal without any issue. But the lower appellate Court came to a different conclusion as regards the construction of Ex. A. In its view, Madurambal was given an absolute estate in the properties, and the gift over in favour of plaintiffs 1 and 2 on the happening of a contingency is void as a repugnant provision and such a clause could not be deemed to be a defeasance provision. The plaintiffs' suit was therefore dismissed.

In this second appeal, it is contended on behalf of the appellants (plaintiffs 2 to 4, the 1st plaintiff having died during the pendency of the suit and plaintiffs 3 and 4 having been added as his legal representatives) that on a proper construction of Ex. A it should be held that either a life estate in favour of Madurambal with a remainder over in favour of plaintiffs 1 and 2 or an absolute estate in her favour subject to defeasance in the event of her failing to have any issue at the time of her death was really conferred on her. Having regard to the terms of the earlier portion of the deed which are to the effect, that

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the donee should enjoy the properties absolutely or with all rights, it cannot be reasonably contended that what was conferred upon her was primarily a life estate alone. The Tamil word " சர்வசுதந்திரமாய் " clearly indicates an absolute estate. The more difficult question is whether the subsequent clause should be deemed to be a mere repugnant condition imposed on the estate so created or makes the absolute estate primarily granted subject to defeasance in the event of the contemplated contingency. The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

The disposition under the will which was the subject of consideration by the Privy Council in two cases reported in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] and *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2] is almost similar to the one under Ex. A. In the aforesaid cases, a Hindu testator devised under his will his entire estate to his five sons. On a construction of the will it was found that the testator conferred an absolute estate on the sons. There was a further clause in the will that if any of the five sons should die without leaving any son or son's son, his estate should devolve upon such of the surviving sons or their sons' sons who shall then be alive. Their Lordships of the Privy Council have held that it was competent to a Hindu testator to give property by way of an executory bequest upon an event which is to happen, if at all, immediately on the close of a life in being. I should observe that in the present case the defeasance clause is exactly similar to the one found in the will above referred to. The provision in Ex. A is that in the event of the donee (Madurambal) dying without any issue the properties should go to her brothers (plaintiffs 1 and 2). The principle of the

1. (1857) 6 M. I. A. 526. 2. (1862) 9 M. I. A. 123.

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decision in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] is recognised and also explained in a recent decision of the Privy Council reported in *Sarajubala Debi* v. *Jyotirmayee Debi*[2]. Their Lordships have observed thus:

> "A Hindu, no doubt, may give property by way of executory gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift, and such a gift over might be a sufficient indication that only a life estate to the first taker was intended."

The disposition under Ex. A being exactly of such a nature, the defeasance clause in it must be held to be valid on the authority of the view expressed by the Privy Council. This is not a case where the executory gift is made to depend upon an event such as an indefinite failure of the male issue of the donee which would not necessarily happen on the close of the donee's life and such a defeasance clause has been held to be void. There is also the decision of this High Court in *Lakshminarayana Nainar* v. *Valliammal*[3], which is almost on all fours with the present case. In that case, the decision depended on the construction of a razinama by which *A* and *B* became entitled to hold and enjoy in common certain properties absolutely. There was a defeasance clause to the effect, that in the event of *A* dying issueless, his share of the properties should go to *B* and then *B* should become entitled to the entire properties. The question was whether the alienation of the properties by *A* during his lifetime could have any legal validity after his death and prevent his share of the properties from devolving on *B*. On the footing that *A* had an absolute estate in a moiety of the properties covered by the razinama, it was held that there was a clear gift over of that moiety on his dying without issue to *B*. Following the Privy Council decision in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] the learned Judges have held such a defeasance followed by a gift over in favour of a person in being to be perfectly valid under the Hindu Law. Reference was also made to the observations in the Privy Council decisions reported in *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry*[4] and *Kristoromoney Dossee* v. *Norendro Krishna Bahadoor*[5]. Holding that the effect of such

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1. (1862) 9 M. I. A. 123.
2. (1931) L.R. 58 I.A. 270: I.L.R. 59 Cal. 142 at 149: 61 M.L.J. 501 (P.C.).
3. (1910) I. L. R. 34 Mad. 250.
4. (1878) L. R. 5 I. A. 138: I. L. R. 4 Cal. 23 (P.C.).
5. (1888) L. R. 16 I. A. 29: I. L. R. 16 Cal. 383 (P. C.).

defeasance was to cut down the original absolute estate of *A* to a life estate, the alienation made by him was held to be invalid beyond his lifetime and not affecting the gift over in favour of *B*. These authorities in my opinion bear directly on the present case, and I am clearly of opinion that the absolute estate conferred upon Madurambal under Ex. A was subject to defeasance in the event of her dying without any issue and such a defeasance clause is not opposed to any rule of law and has been recognised by the Privy Council to be valid. As observed in *Lakshminarayana Nainar* v. *Valliammal*[1] by reason of the operation of the defeasance clause on the happening of the contingency, the original estate was cut down to a life estate and the gift over to plaintiffs 1 and 2 became valid and operative.

On the respondents' side, reliance was placed on the decision of the Calcutta High Court reported in *Sures Chandra Palit* v. *Lalit Mohan Dutta*[2]. There is an elaborate review of the case-law on a question of this kind in that decision. The principle of the Privy Council decisions in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[3] and *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[4] has been held to have no application to the facts of that case. The distinguishing feature in the will which was the subject of consideration in that case was, that though the testator gave an absolute interest in the estate to his widow, the gift over was of what might remain undisposed of by her. The confinement of the gift over to such portion of the estate, if any, which may remain undisposed of by the donee was held to be an indication that the testator intended to maintain an absolute estate in the donee throughout and the gift over was void for uncertainty. Such is not the nature of the defeasance or gift over in the present case. Even the decision of the Privy Council in *Raghunath Prasad Singh* v. *Deputy Commissioner, Partabgarh*[5] has no application to the present case. After conferring an absolute estate on the legatee, the testator added clauses which were clearly restrictive of the incidents of ownership. One of the conditions imposed is that the legatee shall be bound to adhere strictly to the Hindu

1. (1910) I. L. R. 34 Mad. 250.
2. (1915) 31 I. C. 405.
3. (1857) 6 M. I. A. 526.
4. (1862) 9 M. I. A. 123.
5. (1929) L. R. 56 I. A. 372: I. L. R. 4 Luck. 483: 58 M. L. J. 1 (P.C.).

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religion. Another condition is that he shall have no power to alienate the properties. A further clause is that the entire property shall gradually descend to the successors of the legatee subject to the restrictions laid down as binding upon the legatee. That was a glaring case of a grant of an absolute estate with all sorts of restrictions upon the legatee and his heirs which are certainly repugnant to the grant.

It is next argued that by reason of the compromise in a suit between Madurambal and the 1st defendant some of the properties were allotted to 1st defendant absolutely, the rest being taken by Madurambal. The question is whether such a compromise can bind plaintiffs 1 and 2 who were not parties to it. As I have already observed, the gift over in favour of plaintiffs 1 and 2 being valid and as the effect of the defeasance clause was to curtail the absolute estate of Madurambal to a life estate in the event of the contingency happening as was held in the *Lakshminarayana Nainar* v. *Valliammal's*[1] case, any arrangement or disposition in respect of the properties covered by Ex. A by Madurambal can have no legal force or validity after her death and cannot affect the rights of plaintiffs 1 and 2.

The fact that the 1st defendant adopted the 3rd defendant subsequent to the death of Madurambal is not of much avail to the respondents. It cannot be denied that Madurambal died without any issue, either natural or adopted. The moment that contingency happened, the properties devolved on plaintiffs 1 and 2 by reason of the defeasance clause and the gift over to them. The properties having thus vested in plaintiffs 1 and 2 on the death of Madurambal, they could not be divested of those properties by reason of the subsequent adoption made by the 1st respondent. There is hardly any doubt on this point.

For all these reasons, I am unable to agree with the decision of the lower appellate Court. The decision of the first Court should be restored, except as regards items 12 and 21 which are not comprised in Ex. A, on which alone the claim of plaintiffs 1 and 2 was based. In the result, the decree of the lower appellate Court is set aside and a decree is passed in favour of plaintiffs 2 to 4 in respect of the suit properties

1. (1915) I. L. R. 34 M. 250.

except items 12 and 21 with costs against the defendants in all the Courts.

K. C. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE STONE.

The Pioneer Mutual Benefit and Friend-in-need Society, Ltd., Madras .. *Applicant**

v.

The Assistant Registrar of Joint Stock Companies, Madras .. *Respondent.*

The Pioneer Mutual Benefit and Friend-in-need Society, Ltd., Madras v. The Assistant Registrar of Joint Stock Companies, Madras.

Indian Companies Act (VII of 1918), Ss. 22 and 82—Registrar of Companies—Discretion in recording special resolutions altering Articles of Association—Can refuse to record illegal articles—New scheme purporting to confer benefit on recipient to be chosen by lot—Offence against S. 294-A of the Indian Penal Code.

The Registrar of Companies has the same discretion in recording special resolutions altering Articles of Association under S. 82 of the Indian Companies Act as in originally registering Articles under S. 22, and can refuse to record illegal Articles.

A scheme which purports to confer a benefit the recipients whereof are to be chosen by lot is illegal under S. 294-A of the Indian Penal Code.

Wallingford v. *Mutual Society*, (1880) 5 A. C. 685, considered.

Universal Mutual Aid and Poor Houses Association, Ltd., Madras v. *Thoppa Naidu*, (1932) 63 M. L. J. 554, relied on.

The applicant Company was incorporated in April, 1932. Among the objects in the Memorandum of Association as originally presented to the Registrar was the "taking over of the business, assets and liabilities of the Universal Mutual Aid and Poor Houses Association, Limited". That Company had been ordered to be wound up by the Madras High Court as being an illegal business (*Universal Mutual Aid and Poor Houses Association, Ltd., Madras* v. *Thoppa Naidu*[1]). On objection of the Registrar, this clause was deleted and one of the Articles was also amended to provide that loans shall not be granted by lot. Subsequently the Company passed special resolutions altering the Articles of Association and those *inter alia* provided for the taking over of the business of the Company in liquidation as well as the granting of interest-bearing loans by lot. On the refusal of the Assistant Registrar to record the resolutions the Company made this application to the High Court under S. 45 of the Indian Specific Relief Act for an order to compel him to do so.

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*Application No. 2608 of 1932. 1st November, 1932.

1. (1932) 63 M. L. J. 554.

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B. Satyanarayana for applicant.—Under S. 82 of the Indian Companies Act, the Registrar has purely ministerial functions. Under S. 22 he has judicial or discretionary powers and not under S. 82. He has no discretion to refuse to record resolutions. The present scheme is legal. Interest-bearing loans are not "prizes," and the scheme does not constitute a lottery: *Wallingford* v. *Mutual Society*.[1]

S. Parthasarathi (with him *V. K. Thiruvenkatachari*) for respondent (Assistant Registrar).—At the time of incorporation the Registrar could object to the Memorandum, *Bowman* v. *Secular Society*[2], also to Articles, *Princess of Reuss* v. *Jean Brothers*[3]. Ss. 22 and 82 are in the same terms. The Registrar can refuse to record illegal special resolutions, *Reg* v. *Registrar of Companies*[4] and In re *Platt* (unreported Secretarial Practice, p. 378).

Cur. ad vult.

The Court delivered the following

JUDGMENT.—In this matter I reserved judgment in order carefully to consider whether the new scheme fell within *Wallingford* v. *Mutual Society*[1]. I had and have no doubt about the other points raised.

The first question is whether the Assistant Registrar of Joint Stock Companies has power to decline registration of any part of (*a*) a memorandum, or (*b*) articles of a public company. It is said that in S. 82 (relating to the registration of special and extraordinary resolutions) the words in sub-section (1) "who shall record the same" are directory and leave the Registrar no option in the matter. But the same may be said of the duties of the Registrar under S. 22 with regard to the registration of the memorandum and articles yet there can be no doubt that the Registrar of Joint Stock Companies has a discretion to refuse to register a memorandum. As Lord Parker observed in *Bowman* v. *Secular Society, Ltd.*[2]:

> "The Registrar fulfils a quasi-judicial function . . . Only by misconduct or great carelessness on the part of the Registrar could a company with objects wholly illegal obtain registration."

But it is said that although that applies to a memorandum it does not apply to a resolution altering articles. I entirely fail

1. (1880) 5 A. C. 685.
2. (1917) A. C. 406 at 439.
3. (1871) L. R. 5 H. L. 176 at 200.
4. (1847) 10 Q. B. 859 : 116 E. R. 318.

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to see why S. 22 relates to a memorandum and articles and if the Registrar can in the exercise of his quasi-judicial function refuse to register a memorandum I should think it is almost an unarguable proposition that he yet must register articles. If he can exercise his discretion with regard to articles he must obviously be able to exercise a discretion with regard to the alteration of articles.

In this case an effort has been made to alter the articles so as to enable this company to carry on, in effect, the business of Universal Mutual Aid and Poor Houses Association, Ltd., which company was compulsorily wound up as constituting a lottery. I will say nothing about that company.

This present company now desires to offer a somewhat different scheme to the public. Under the old scheme subscribers got the certainty of an interest-free loan in time but the quantum of the loan and of course the time was determined by lot and cash certificates gave an equal chance. Under the present scheme the subscriber is entitled to one loan and the chance does not increase with the number of certificates held. I have carefully considered *Wallingford* v. *Mutual Society*[1] in the light of the judgments of the Chief Justice and Cornish, J. in *Universal Mutual Aid and Poor Houses Association, Ltd., Madras* v. *Thoppa Naidu*[2] and in my opinion this scheme offends against S. 294-A of the Indian Penal Code in exactly the same way as did the Universal Mutual Aid scheme. The only difference is that the present scheme offers a prize that is not very valuable but which will probably be obtained within a reasonable time by most subscribers whereas the other scheme offered prizes that were very valuable but which would not be drawn by the majority within a reasonable time.

It is said that there is no prize at all. In my opinion there is but really the use of the word "prize" is unnecessary. What the Penal Code says is "publish a proposal to do anything for the benefit of any person". It seems to me to be clear that a loan of Rs. 1,000 on personal security is something which a person desiring to borrow would regard as a benefit. It is true that the rate of interest is left at large but that simply means that a trap is or may be prepared for the unwary. The obvious intention is to offer to the public something that is attractive and the attraction is a loan on personal security, that

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1. (1880) 5 A. C. 685 at 696-697. 2. (1932) 63 M. L. J. 554.

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is held up as a benefit and that benefit is obtained by this man or that according as this man or that is fortunate in a draw.

If this were straight business whereby a money-lending association were offering to lend money to all of a class it would be quite unnecessary to invoke the machinery of the draw. It is because the lucky person gets something more than he could get under ordinary business conditions that it is necessary to select him by lot. Whether this sort of a scheme is one which should be encouraged or not, whether it is likely to mislead the ignorant anxious to raise money or not is not my concern. Whether this falls within S. 294-A of the Indian Penal Code is the question I have to consider. If it does it is certainly better to stop it at the threshold rather than to allow the company to proceed along these lines and then wind it up as an illegal company after many thousands of people may be, have entered the scheme.

In my opinion it does offend against S. 294-A and the Assistant Registrar of Joint Stock Companies was right in refusing to register the articles as presented to him. The motion is accordingly dismissed with taxed costs.

K. C. *Motion dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of Appeal of New Zealand.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR JOHN WALLIS.

Aspro, Ltd. .. *Appellants**

v.

The Commissioner of Taxes .. *Respondent.*

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Aspro, Ltd. *v.* The Commissioner of Taxes.

Income-tax Act (XI of 1922), S. 10 (ix)—Private Company—Fees for directors—Deduction of—Permissibility—New Zealand Land and Income-tax Act, 1923, S. 80 (2).

The trading account of a private Company showed a debit of £10,000 in respect of fees to its two directors. The Company claimed to deduct this amount from its assessable income as exclusively incurred in the production of that income(under S. 80(2) of the New Zealand Land and Income-tax Act, 1923, corresponding to S. 10 (2) (*ix*) of the Indian Act). The two directors were the sole directors as well as the sole shareholders. At the end of each trading year when a fair estimate of the profits was available or in some years, after the amount of profits had been ascertained, the fees to the directors were fixed by a resolution of the Company and that approximately at two-thirds of the gross profits.

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*P. C. Appeal No. 81 of 1931. 27th July, 1932.

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Held, (i) that the mere production of a resolution fixing the remuneration of the directors and vouchers for payment of the amounts so fixed did not preclude further enquiry by the Commissioner and entitle the Company to the deduction claimed; (ii) that having regard to the complete identity of the persons interested as shareholders in fixing the fees and of the persons to whom the fees were to be paid, and to the refusal of the directors to allow themselves to be examined as how the amount was fixed, the Company had failed to discharge the onus under Ss. 14 and 25; and (iii) that the Magistrate was justified in holding it not proved that the amount was exclusively incurred in the production of the assessable income.

Johnson Brothers & Co. v. *Inland Revenue Commissioners*, (1919) 2 K. B. 717, distinguished.

Appeal No. 81 of 1931 from a judgment of the Court of Appeal of New Zealand, dated the 29th August, 1930, affirming an assessment to income-tax upon the appellants.

A. M. Latter, K. C. and *G. O. Slade* for appellants.

Greene, K. C. and *G. R. Blanco White* for respondent.

27th July, 1932. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a judgment of the Court of Appeal of New Zealand, dated the 29th August, 1930, dismissing an appeal from a judgment of the Stipendiary Magistrate of the Wellington District, dated the 12th December, 1929, dismissing an appeal against the assessment to income-tax made on the present appellants by the present respondent in respect of the year to the 31st March, 1929.

The appellants' trading account for the year to the 31st March, 1928, which fell to be treated as the income year for the purpose of the assessment, showed a debit item of £10,000 in respect of directors' fees, which they claimed as a proper deduction. But the respondent disallowed this item to the extent of £8,000, on the ground that, to that extent, it was not exclusively incurred in the production of the assessable income, and he assessed the appellants accordingly; the appellants challenge the assessment in this respect.

The provisions of the Land and Income-tax Act, 1923, as to deductions, so far as material, are as follows:—

"80. (2) In calculating the assessable income of any person deriving income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year. . . . Save as herein provided, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer."

The statute provides a special code by which a taxpayer, who is dissatisfied with the assessment made by the Commissioner, may appeal against it, but it must first be noted that, under S. 14, the taxpayer is made liable to pay the tax as

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assessed by the Commissioner "save in so far as he establishes on objection that the assessment is excessive or that he is not chargeable with tax". The special procedure for appeal by way of objections to assessments is contained in Ss. 22 to 38, of which the following provisions are material:—As regards procedure in the Magistrate's Court, S. 25 provides:

"On the hearing and determination of all objections to assessments of land-tax or income-tax the burden of proof shall be on the objector, and the Court may receive such evidence as it thinks fit, whether receivable in accordance with law in other proceedings or not."

Where, as here, the amount in dispute exceeds £200, a right of appeal to the Supreme Court from the determination of the Magistrate is given on both law and fact and, on such appeal being taken, S. 30 provides that the Magistrate should state and sign a case setting forth the evidence taken before his Court and the questions of law arising for the determination of the Supreme Court. As the present case only raised a question of law, it was removed, with the consent of parties, from the Supreme Court into the Court of Appeal under the provisions of S. 33.

It will thus be seen that in the present appeal the power of review of their Lordships is limited to questions of law, and that the appellants have to discharge the burdens laid upon them by Ss. 14 and 25.

The material facts may be summarised as follows:—The company was incorporated in 1923 as a private company, and since then has carried on business in Wellington as manufacturers and vendors of a patent medicine which is known as "Aspro," and sold in tabloid form.

The capital of the company consists of 20,000 fully paid-up shares of £1 each, of which Messrs. G. R. Nicholas and A. M. Nicholas each hold 10,000 shares. These shares, along with £50,000 debentures, were given by the company to the Messrs. Nicholas as consideration for an exclusive license to use the trade mark "Aspro," and to deal in the commodity in New Zealand. Throughout the existence of the company, the Messrs. Nicholas have been the sole directors of the company as well as the sole shareholders.

The company's trading year ended on the 31st March in each year, the first year's accounts covering only nine months' trading. The directors' fees were fixed towards, or after, the end of each trading year. The following table shows the

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amount of the fees in each year, the date when they were fixed and the net profits left to the company after deduction of the fees:—

Year ending.	Date Directors' fees were fixed.	Fee fixed for each Director.	Net profit left to Appellant.
31st March 1924.	27th March 1924.	£1,500.	£1,418 9 10
31st March 1925.	16th March 1925.	£2,500.	£2,616 14 10
31st March 1926.	1st July 1926.	£3,250.	£3,170 11 8
31st March 1927.	21st June 1927.	£5,000.	£4,924 13 7
31st March 1928.	8th June 1928.	£5,000.	£5,145 6 6

These fees were fixed each year by resolution of the company in general meeting. The company having adopted Table "A" of the New Zealand Companies Act, 1908, the remuneration of the directors is provided for by Art. 78, which is as follows:—

"The directors shall be paid out of the funds of the company, by way of remuneration for their services, such sum or sums as the company may from time to time fix at a general meeting, and such remuneration shall be divided amongst them in such proportions as the directors may determine."

Prior to the year ended in March, 1928, their amount so fixed was accepted as a proper deduction for income-tax purposes by the Commissioner.

The two directors in question reside in Melbourne and direct the policy of the New Zealand company from there. The parent company is an Australian company, and there is also a subsidiary English company, and the Messrs. Nicholas are also directors of these two companies. A comparison of the monthly sales of these three companies shows that the volume of the Australian business is about eight times, and the volume of the English business about eleven times, that of the New Zealand business. There is a local manager in Wellington, who acts under the direction of Melbourne; weekly samples of the mixtures made in Wellington are sent to Melbourne, which are tested by Mr. G. Nicholas, and the result is reported by him to Wellington. The manager stated that about three letters each way would pass between Wellington and Melbourne, and that about one letter in six of those sent by him would be referred to the directors. While it was stated that the directors paid periodical visits to New Zealand, it was admitted that neither of them had been in New Zealand in the year in question. They declined to give the respondent information as to the amount of time spent by them in New Zealand since the inception of the company, and neither of them appeared to give evidence before the Magistrate.

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The appellants maintained, in the first place, that the production by them of a resolution fixing the remuneration of the directors for their services in terms of Art. 78, and vouchers for payment of the amounts so fixed, when taken along with the admitted fact that services had been rendered, was sufficient to exclude any further enquiry by the Commissioner and to entitle them to a deduction in terms of S. 80 (2) of the Act. But this contention was not seriously pressed, and, in their Lordships' opinion, it is untenable.

The appellants maintained, in the second place, that the Commissioner was not entitled to challenge the amount paid by the company to its servants for their services on the ground of excess or over-generosity in its amount, for that was entirely a matter in the discretion of the company, and that he could only challenge such payments on the ground that it was not a genuine transaction, being in fact fictitious or the sums so paid being, wholly or partly, not truly paid as remuneration for their services. They maintained that, in the present case, there was no evidence to justify any such ground of challenge by the Commissioner and that, accordingly, the Magistrate was bound to sustain the appellants' objections and to hold that the assessment was excessive. The respondent substantially accepted the premises of this contention, but he maintained that the state of the evidence was such that the appellants had failed to establish that the assessment was excessive, as required by S. 14, or to discharge the burden of proof laid on them by S. 25.

In their Lordships' opinion, there is no material difference between these two aspects of the argument for present purposes, and the true issue is whether there was evidence before the Magistrate on which he was entitled to refuse to hold it proved that the £10,000 had been exclusively incurred in the production of the assessable income and that the assessment was excessive. If the only evidence before him had been the company's resolution fixing the directors' fees and vouchers for payment of the amounts so fixed, it is difficult to see how the Magistrate could reasonably have refused to hold that the assessment was excessive, and the question must be whether there was further evidence which reasonably entitled the Magistrate to decline to hold it proved that the assessment was excessive.

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Their Lordships are of opinion that the state of the evidence was not such as to compel the Magistrate to the conclusion that the £10,000 had been exclusively incurred in the production of the assessable income. There was complete identity of the persons interested as shareholders in fixing the amount of the fees to be paid to the directors and of the persons to whom the fees were to be paid, and, except in regard to its bearing on the liability of the company to tax, it made no difference to the destination of the money whether the amount of the fees represented fair remuneration for the directors' services or not. The Messrs. Nicholas, who, as sole shareholders and sole directors, alone knew how the fees came to be fixed, not only declined to allow the respondent to examine them on this matter, but did not come forward to give evidence before the Magistrate, although the burden of proof was upon them. Further, in this situation, it is not irrelevant to take also into account that in each year the fixing of these fees was made when a fair estimate of the trading results for the year was available and that in each year, of the balance available for directors' fees and for distribution among the shareholders, about two-thirds was apportioned to directors' fees. In their Lordships' opinion, the Magistrate was entitled to hold that the appellants had failed to prove that the £10,000 had been exclusively incurred in the production of the assessable income.

None of the authorities cited appear to have much bearing on the present case, except possibly the case of *Johnson Brothers and Co.* v. *Inland Revenue Commissioners*[1] in which the sums paid to the owner's sons, who were employed in the business, were disintegrated, on the evidence of the owner himself, into the amount of a fair wage and a balance which "might be considered as paid on account of family feeling"; but there was nothing equivalent to the resolution of the company in the present case.

For these reasons their Lordships are of opinion that the judgments appealed from were right and that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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1. (1919) 2 K. B. 717.

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Solicitors for appellants: *Stafford Clark & Co.*

Solicitors for respondent: *Mackrell, Maton, Godlee and Quincey.*

S. R. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Canada.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR GEORGE LOWNDES.

The Corporation of the City of Montreal .. *Appellants**

v.

The Montreal Industrial Land Co., Ltd. .. *Respondents.*

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Interpretation of statutes—Generalia specialibus non derogant—*Earlier special enactment—Subsequent general enactment—Effect of.*

When the Legislature has given its consent to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. But in that respect every enactment must be construed according to its own subject-matter and its own terms

The Charter of the City of Montreal was amended in 1910 by 1 Geo. V, c. 48, which specifically dealt with the annexation of the town of Longue Pointe as a ward of the City. It conferred on the City the power to macadamise the streets, the cost of it to come out of the general fund of the City. The Charter was again amended by several Acts in 1911, 1912 and 1914 which provided that "notwithstanding any law to the contrary," the cost of paving shall be apportioned among the proprietors in the respective streets or lanes.

Held, that having regard to the fact that the amendments were all of the statutory Charter and that the special enactment was recognised in the same statute as the general enactment, the later, though general, enactment modified the earlier statute and that the City had the power to charge the frontagers.

Appeal No. 83 of 1931 by special leave from a judgment of the Supreme Court of Canada.

L. E. Beaulieu, K. C. and *Guillaume Saint Pierre* for appellants.

Aime Geoffrion for respondents.

28th July, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—In this appeal the appellants, the City of Montreal, were defendants in the action and were resisting a claim by the respondents, the plaintiff company, that the Court should set aside an assessment made on them in respect of the cost of certain works of paving executed by the appellants on a

* P. C. Appeal No. 83 of 1931. 28th July, 1932.

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road or street called Sherbrooke Street, the respondents being frontagers or bordering owners. The district, in which that street was, had before 1910 formed part of the town of Longue Pointe, but in 1910 that town was annexed by the appellants and included in the City of Montreal, as part of a larger scheme for the enlargement of the City boundaries. To carry out these annexations an Act was passed in 1910 by the Legislature of the Province of Quebec, Statutes of Quebec, 1 Geo. V, c. 48—which amended the charter of the City of Montreal, embodied in Statutes of Quebec, 62 Vict., c. 58 (1899) ; by S. 1, sub-section (*i*) of this amending Act a number of provisions were enacted relating to the annexation of the town of Longue Pointe, which was to form a ward of the appellant City under the name of Longue Pointe Ward, the City was to do various works of public utility within certain periods, certain privileges were to be granted to the inhabitants and in particular certain streets or highways were to be opened and macadamised, within six months from the date of the sanction of the Act; including Sherbrooke Street. At the date of the Act, the appellant City had general powers under its charter to open up streets, but there were no specific provisions then in force as to charging the frontagers for such work: an Act of 1908 (Statutes of Quebec, 8 Edw. VII, c. 85) by S. 14, had repealed the statutory provisions in S. 455 of the charter, enabling the appellant City in certain events to charge one-half of the cost of paving to frontagers. It has been assumed before their Lordships, in this appeal and rightly assumed, that the costs of macadamising under the Act of 1910 would come out of the general fund of the appellant City and be borne by the ratepayers generally, without any specific charge being made on the respondents. The appellants did not execute the various works under the Act of 1910 within the statutory period. Accordingly by an Act of 1912 (Statutes of Quebec, 3 Geo. V, c. 54), S. 48, it was provided that " without otherwise amending the charter of the City the latter shall have until the 1st January, 1915, to complete the work it has undertaken to do" by the annexation Act referred to above, which included among many others the works at Longue Pointe: the section added: "and until that date no judicial proceeding by mandamus or otherwise shall be taken or maintained against the City to compel it to execute the said works." Finally, after similar statutory

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extensions in 1915, 1918 and 1920, it was enacted in 1921 (Statutes of Quebec, 11 Geo. V, c. 111) by S. 10 that the appellant City should not be compelled by mandamus or other legal procedure to fulfil before the 1st May, 1925, the obligations imposed upon it by the Act of annexation of 1910. All these Acts were Acts amending the statutory charter. Meanwhile certain other amendments had been made of the charter with reference to works of paving in the City of Montreal. The first of these was in 1911, and was effected by S. 25 of Statutes of Quebec, 1 Geo. V, c. 60, which so far as material was in the following terms:—

"The following article is inserted in the Act 62 Victoria, chapter 58, as Article 455:—

'455. (1) Notwithstanding any law to the contrary, when the city of Montreal shall decide and order the paving of any street, lane, highway, square or public place, wholly or partly, with permanent materials other than wood and macadam; the total cost of such paving shall be paid by the proprietors of immoveables bordering on such street, lane, highway, square or public place.

(2) A roll shall be prepared for such purpose by the city surveyor, and the total cost of such paving shall be apportioned among such proprietors proportionately to the frontage of their properties as shown on the valuation roll, independently of the buildings thereon erected.'"

Again, in the Act of 1912 already referred to, it was provided by S. 29 as follows:—

"Article 455 of the Act 62 Victoria, chapter 58, as enacted by the Act 1 George V (2nd Session), chapter 60, S. 25, is replaced by the following:—

'455. (1) Notwithstanding any law to the contrary, when the board of commissioners shall decide and order by resolution the paving of any street, lane, highway, square or public place, wholly or partly, with permanent materials declared to be such by the said board the total cost of such paving, including the intersection of lanes, shall be paid by the proprietors of immoveables situate on such streets, lanes, highways, squares or public place or part thereof, with the exception, however, of the paving of the intersections of streets which shall be paid by the city out of the loans fund.'"

Again, in 1914, by S. 26 of Statutes of Quebec, 4 Geo. V, c. 73, the following provision was enacted:—

"Article 455 of the Act 62 Victoria, chapter 58, as enacted by the Act 1 George V (2nd Session), chapter 60, section 25; and replaced by the Act 3 George V, chapter 54, section 29; is replaced by the following:—

'455. The city may, by a resolution of the board of commissioners approved by the majority of all members of the council, charge the proprietors the whole or a portion of the cost of permanent pavement, or of pavements which it declares to be permanent, which shall be laid or re-laid in future. To that end it may, by such resolution, impose a tax on each property in front of which such pavement shall be laid or re-laid, either at the rate of a uniform price per square yard of pavement contained in half the width of the street in front of such property, or at the rate of a fixed uniform sum per foot of frontage. Such tax shall be levied and apportioned by means of a roll made out in accordance with the procedure laid down in Article 460, and Articles 456, 457A and 460 shall apply to such rolls. Or it

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may, by a resolution passed in the same manner, annually impose a special tax on all immoveable properties situate in the city, based on the valuation of the said properties as shown on the valuation roll. Such tax shall be entered in the annual general roll of assessments on immoveable properties.' "

Acting under this last statute, the Council of the appellant City on the 20th July, 1925, resolved to adopt a report and recommendation:—

". . . qu'un pavage permanent soit construit sur la rue Sherbrooke, entre les rues Duquesne et Desautels, quartier Mercier, que le cout de ce pavage soit mis a la charge des proprietaires d'immeubles en face desquels il sera fait et que, a cette fin, il soit impose sur chaque immeuble en face duquel le dit pavage sera fait, une taxe speciale fonciere repartie au moyen d'un role prepare conformement a la loi, au taux fixe et uniforme de $22·57 le pied de front de chacun des dits immeubles, le tout conformement aux dispositions de la charte de la Cite."

The work of paving under the resolution was begun on the 1st May, 1926, and finished on the 22nd December, 1926. The paving so done was different from macadamising: in fact, Sherbrooke Street was never macadamised. There was no evidence that if macadamising had been done, the cost of the paving actually executed (which appears to have been asphalt) would in any way have been reduced. On the 13th December, 1928, the respondents were assessed in the sum of $5,888·04 in respect of the paving, being at the rate of $5 per square yard. This rate was an arbitrary rate and less than the actual cost, the assessment being made under an Act of 1928, amending the charter of the City of Montreal (Statutes of Quebec, c. 97), which by S. 15 provided that notwithstanding the earlier provisions relating to charging for paving:

" . . . the cost of pavings laid since the 1st January, 1919, and that of pavings to be laid hereafter on public places, streets or lanes, shall be charged to the bordering proprietors at the uniform price of five dollars per square yard, payable cash or in twenty annual instalments, according to the number of frontage feet of the immoveables belonging to them."

The assessment was objected to by the respondents, who on the 8th February, 1929, brought an action to have the assessment and ancillary proceedings set aside and declared void and illegal. The claim was dismissed by Desaulniers, J., the Trial Judge, whose judgment was affirmed on appeal by the Court of King's Bench by a majority consisting of Dorion, Tellier, and Bernier, JJ., Howard and Galipeault, JJ., dissenting. From these decisions an appeal was taken to the Supreme Court of Canada, which, by a majority, allowed the appeal, reversed the judgments below, and set aside the assessment roll in question: Anglin, C.J., Rinfret and Smith, JJ., concurred in this

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decision, Lamont and Cannon, JJ., dissenting. From the judgment, the present appeal is brought by special leave.

The appellants' case was primarily rested on the statute of 1928 quoted in part above under which the assessment in question was made. That statute, it was argued, provided that the cost of pavings laid since the 1st January, 1919 . . . . . on public places, streets or lanes should be charged on bordering proprietors at the uniform price of $5 per square yard. What pavings answered this description could be proved by evidence, so that the position was as if the list of actual pavings had been set out seriatim in the section: in that list Sherbrooke Street would have figured and the name of the respondents would have appeared as that of the bordering proprietors: hence the position was the same as if a specific and express enactment had expressly imposed the assessment on the respondents. No doubt the statutory provision is retrospective, but it has not been suggested that the validity of the provision is on that account impaired. Their Lordships think this case is well founded. Mr. Geoffrion for the respondents has argued that the section must be read as limited to pavings lawfully laid, and that the pavings in question were not lawfully laid, and were therefore outside the section so that the assessment on the respondents was bad. He has contended that the pavings were unlawfully laid because the positive enactment in the statute of 1910 placed on the appellant City the obligation to macadamise the street in question, and hence by implication prohibited the appellant City from laying any different kind of paving and therefore from laying the paving actually laid which was admitted to be different from macadam. He further contended that the later statutory provisions quoted above, which gave the appellant City the power of resolving to lay permanent paving and to charge the frontagers with the cost did not repeal or derogate from the statute of 1910 and were irrelevant for the purposes of this case. Their Lordships do not accept these contentions. It is no doubt true that the statute of 1910 imposed an obligation on the appellant City, which was recognised from time to time by the statutory provisions extending the time for performance: it may be that the obligation represented in fact a bargain between the appellant City and the town which was annexed for the benefit of the town's inhabitants: but, however that may be, the obligation was

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embodied simply in the statute of the province, and the legislature which enacted that statute could repeal or modify it, even though to do so might appear inequitable. The question is whether the later legislation has repealed or modified the obligation. The respondents relied on the principle that *generalia specialibus non derogant*: that is, in this case, to say that the statutes after 1910 were general, referring to all paving done in the whole area of the appellant City, and hence did not derogate from or affect the statutory provisions specially relevant to the specific streets dealt with in the statute of 1910. The rule was thus stated by Lord Hobhouse in giving the opinion of this Board in *Barker* v. *Edgar*[1]:

"When the legislature has given its consent to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly."

But Lord Hobhouse adds:

"Each enactment must be construed in that respect according to its own subject-matter and its own terms"

The principle has often been discussed in many reported cases, with results sometimes in one direction and sometimes in others. In the present case, the various enactments are all amendments of the same statutory charter, and as appears above in certain cases the special enactment is recognised in the same statute as the general enactment. But their Lordships are of opinion that the fair construction on the whole is that the legislature intended to give the appellant City's Council a discretion to pass a resolution to effect permanent paving if in their view it was the proper course to take, instead of macadam, even in the case of streets falling within the statute of 1910, and to do so even though they had not actually macadamised the streets. If the obligation to macadamise had been fulfilled, it could not be contested that under the later enactment the appellant City Council had the right subsequently to remove the macadam and lay the permanent pavement and in doing so avail themselves of the power to charge the frontagers; and it seems that this right could not be denied merely because the macadam had not been laid at all, if the interests of highway efficiency in the opinion of the Council required the right to be exercised. It is not necessary here to consider whether or not any persons had any right of action

1. (1898) A. C. 748 at 754.

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because the macadam was not laid. In effect therefore the obligation to macadamise free of cost to the frontagers was qualified by the right of the appellant City Council to substitute other paving if in their opinion circumstances so required. In this way the various enactments can be read together. Hence, in their Lordships' judgment, the appellant City, in paving Sherbrooke Street as they did, were not doing any unlawful act.

But, even if the paving were unlawful, their Lordships cannot hold that the Act of 1928 would not apply or that the words "pavings laid" could be limited to pavings lawfully laid. There is no saving clause. The words are simply words of positive fact, relating to matters capable of precise identification. If the respondents desired to have the limitation they now claim on these words they ought to have obtained the addition to the statute of apt words of qualification.

In the result their Lordships are of opinion that the appeal succeeds, that the judgment of the Court of King's Bench affirming the judgment of the Trial Judge upholding the assessment as valid should be restored and the respondents should pay the appellants' costs of the appeal and their costs in the Courts below.

They will humbly so advise His Majesty.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake and Redden.*

S. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BARDSWELL.

M. Shanmuga Mudaliar .. *Petitioner** (*Respondent*)

v.

S. Subbaraya Mudaliar and another .. *Respondents* (*Petitioner and another*).

Shanmuga Mudaliar *v.* Subbaraya Mudaliar.

Certiorari—*Order of Election Commissioner—Erroneous view of law—Writ whether can be issued—Commissioner entertaining point not taken in petition—Legality—Madras District Municipalities Act (V of 1920), S. 49—Rules for the Conduct of Inquiries and Decision of Disputes relating to Elections, R. 11 (2)—Exercise of discretion by Commissioner — Interference.*

When a Court, or similar authority, gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law, a writ of *certiorari* will be issued, but there will be no writ if it makes a mistake in the

*C. M. Ps. Nos. 4040 and 4335 of 1932. 15th September, 1932.

law when acting in the exercise of a jurisdiction which it undoubtedly possesses. Thus an erroneous decision on the question whether a candidate is disqualified for election by reason of S. 49 of the Madras District Municipalities Act is no ground for ordering a writ if the Lower Court had otherwise acted within the limits of its jurisdiction. Where, however, the Election Commissioner declares an election to be void on a ground not taken in the election petition his action is one in excess of jurisdiction and a writ may be issued.

Govindaswami Pillai v. *Ramalingaswami Pillai*, (1931) 62 M. L. J. 644, *Ramaswami Goundan* v. *Muthuvelappa Gounder*, (1922) I. L. R. 46 Mad. 536: 44 M. L. J. 1 and *R. S. Naidu* v. *J. Ramier*, (1926) 51 M. L. J. 701, relied on.

Where the Election Commissioner holds an election to be void and declares the person who got the next highest number of votes to be duly elected, his order is valid, even though the effect of the order may be to disenfranchise a large number of voters, who had voted in ignorance of the disqualification of the candidate whose election has been set aside. Propriety of ordering fresh election in such cases pointed out.

Petition praying that in the circumstances stated in the affidavit filed with C.M.P. No. 4335 of 1932 the High Court will be pleased in the exercise of its inherent powers under the Letters Patent and S. 106 of the Government of India Act to issue a writ of *certiorari* calling upon the 2nd respondent herein to submit the records relating to O. P. No. 34 of 1931 on his file and make the writ *nisi* absolute and quash the order and proceedings in the said O. P. No. 34 of 1931.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *D. Krishnaswami* for petitioner in C. M. P. No. 4040 of 1932.

S. Srinivasa Aiyangar, S. Parthasarathi and *V. K. Tiruvenkatachari* for petitioner in C. M. P. No. 4335 of 1932.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for respondents in both.

The Court made the following

ORDER.—In each of these petitions the issue of a writ of *certiorari* is prayed for in order to quash an order of the Election Commissioner of Vellore, dated 19th August, 1932, in O.Ps. Nos. 34 and 35 of 1931. The Election Commissioner is in his ordinary official capacity the Subordinate Judge of Vellore. As Election Commissioner he is *persona designata*. For the purposes of this order the petitioner and respondent No. 1 in C. M. P. No. 4040 will be styled respectively the 1st petitioner and the 1st respondent. The petitioner and the 1st respondent in the other petition will be styled respectively the 2nd petitioner and the 2nd respondent. The 2nd respondent in both the petitions is the Election Commissioner, who is only a party *pro forma*.

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On the 8th October, 1931, an election was held for Ward No. 14 of the Tiruvannamalai Municipal Council. The result declared next day was as follows:—

		Votes.
1st petitioner	..	215
2nd "	..	160
2nd respondent	..	64
1st "	..	8

There were two other candidates who got 4 and 5 votes respectively. With these we are not concerned. The two respondents filed respectively O. Ps. Nos. 34 and 35 of 1931 before the Election Commissioner. In O. P. No. 34 it was prayed that the election of the two petitioners might be declared void and that the 1st respondent might be declared duly elected. In O. P. No. 35, the 2nd respondent asked for a similar relief for himself on similar grounds. The Election Commissioner has passed one judgment on both the petitions before him and has declared the election of both the petitioners void and at the same time has declared the two respondents to be duly elected. The 2nd respondent like the 2nd petitioner is a woman, and her election is for a reserved seat.

The order of the Election Commissioner is based upon his interpretation of S. 49 (2) (*f*) of the Madras District Municipalities Act by which a person shall be disqualified for election as a Councillor if such a person is, at the date of nomination or election, a servant or employer or an official subordinate or official superior of a Councillor holding office on the said date. Now it has been established by a Full Bench decision of this Court in *Selvaranga Raju* v. *Doraiswami Mudaliar*[1] that a disqualification under S. 49 can be made a ground for a petition before an Election Court impugning an election and so the Election Commissioner certainly had the jurisdiction to enquire into the objections of the present respondents to the election of the petitioners with regard to that section. It has also been held by a Divisional Bench of this Court in *Govindaswami Pillai* v. *Ramalingaswami Pillai*[2] that an election officer is empowered by the rules to reject a nomination because a candidate is disqualified under S. 49 and that this involves a power and duty of deciding whether, in fact, the candidate is so disqualified; and the same case points out that

1. (1929) I. L. R. 52 Mad. 732: 57 M. L. J. 241 (F. B.).
2. (1931) 62 M. L. J. 644.

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the decision of a tribunal does not become without jurisdiction because it is wrong. In the present instance it has been urged that the Election Officer's interpretation of S. 49 is incorrect and it is sought, with reference to many English authorities, to show that this incorrect interpretation amounts to an error of jurisdiction. None of the decisions, however, that have been quoted to me justifies my acceptance of this argument. In the face of the decision of this Court, already quoted, in *Govindaswami Pillai* v. *Ramalingaswami Pillai*[1], it is unnecessary for me to go into an elaborate discussion of all these decisions. I shall merely mention them with a minimum of comment. They are: *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.*[2], *King* v. *Electricity Commissioners*[3], *Rex* v. *Board of Education*[4], *Rex* v. *Nat Bell Liquors, Ltd.*[5], *The Colonial Bank of Australia* v. *Willan*[6], *Rex* v. *Lincolnshire Justices*[7] and *Rex* v. *The London County Council*[8]. Not one of these decisions is an authority for the position that an erroneous decision on a point of law, by Lower Court acting within the limits of its jurisdiction, can be a ground for issuing a writ of *certiorari*. The decision in *The Colonial Bank of Australia* v. *Willan*[6] is very clear as to this when it says that a Court will not quash, except on a ground either of manifest defect of jurisdiction in the tribunal which made it or of manifest fraud in the party procuring it; and again, in *Rex* v. *Lincolnshire Justices*[7] it has been ruled that if the Lincolnshire Justices were bound to come to some conclusion, right or wrong, then they had jurisdiction and a writ could not be issued because of the wrong conclusion. The matter has been summed up in *Halsbury's Laws of England*, Vol. 10, paragraphs 379 and 381. Paragraph 379 shows that where in the face of the proceedings themselves it appears that the determination of an inferior Court is wrong in law, *certiorari* will be granted; but this has to be read with what follows in paragraph 381 that, where proceedings are regular on their face, and a Court has had jurisdiction, the superior Court will not grant the writ of *certiorari* on the ground that the Court below has misconceived

1. (1931) 62 M. L. J. 644.
2. (1878) 4 A. C. 30.
3. (1924) 1 K. B. 171.
4. (1910) 2 K. B. 165.
5. (1922) 2 A. C. 128.
6. (1874) 5 P. C. 417.
7. (1926) 2 K. B. 192.
8. (1931) 2 K. B. 215.

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the point of law. Indeed, that paragraph 379 is not intended to show that a writ can be granted because of an erroneous conclusion on a point of law arrived at in the proper exercise of the Court's jurisdiction, is known by what that section goes on to say as to in what kind of circumstances such a writ can be granted. It comes to this that when a Court, or similar authority, gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law, a writ will be issued, but that there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses. It is true that in *Gould* v. *Gapper*[1] a writ of prohibition was granted even when the error did not appear on the face of the proceedings but had to be collected from the whole of it; but even in this case the error was one of jurisdiction, it being one arising from the clash of procedure between the Ecclesiastical Courts and the ordinary Courts of Common Law. It is unnecessary for me to discuss the matter further when the matter has already been decided by a Divisional Bench of this Court, whose decision I am bound to follow. However much, then, I may think that the interpretation by the Election Commissioner of S. 49 is incorrect, I cannot, in that he arrived at that interpretation in the exercise of a jurisdiction which he possessed, grant a writ of *certiorari* because of the decision being erroneous.

There is one more decision of this Court to which I may refer, *Ramaswami Goundan* v. *Muthuvelappa Gounder*[2]. In this case the point of a wrong interpretation of the law having been given by a Judge in the exercise of his jurisdiction was considered, on an application for revision under S. 115, Civil Procedure Code and Ss. 106 and 107 of the Government of India Act. But in that case there was not merely this wrong interpretation of the law, but it further led to acts which amounted to an excess of jurisdiction, one of these being the declaration of a party as having been elected as President when, as far as the record went, it appeared that that was a relief which had not been prayed for, and another being that a person was removed from the post of President on a ground that had not been taken in the petition on which the order as to that was passed. The ultimate order passed in that case, I may note,

1. (1804) 5 East 345: 102 E. R. 1102 at 1107.
2. (1922) I. L. R. 46 Mad. 536: 44 M. L. J. 1.

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was that the petition under review was remanded for disposal on its merits according to law.

The learned Advocate-General has referred to a finding in *Rex* v. *Board of Education*[1] that the Board of Education had, by answering a question not referred to it and avoiding any answer to the real question, declined jurisdiction. He contends that in this case the Election Commissioner has not addressed himself to the only point that he was qualified to deal with, *viz.*, whether the present petitioners were holding office at the time of their nomination. From the order under review, however, I cannot find that this position taken by the learned Advocate-General is justified. In the course of the order I find the following passages: (1) "The words 'holding office on the said date' mean holding office on the date of nomination or election by virtue of which the relationship of being official subordinate or official superior came into existence"; (2) "The persons in question became councillors and both held office of trustee and *dasi* respectively on the dates of nomination and election." (3) "I therefore hold that the only reasonable meaning of S. 49 (2) (*f*) is that official superiors or official subordinates holding such office on the date of nomination or election are disqualified from sitting as councillors." (4) "As I have observed *supra* Vrithambal Ammal (*i.e.*, 2nd respondent) is the official subordinate of the Councillor Shanmuga Mudaliar. She was such a subordinate on the date of nomination and election." It is impossible to find in the light of these remarks that the Election Commissioner has failed to address himself to the point which he had to consider in coming to a conclusion upon the objections taken with reference to S. 49. It has also been argued with reference to *Rex* v. *Wandsworth Licensing Justices*[2] that there is a case for a writ here, in that the Election Commissioner has been influenced by extraneous considerations. The reference is to his view that the words "holding office" need not mean holding office as Municipal Councillor but may refer to the office in respect of which one person is superior or subordinate to another. But, though his view as to this may be wrong, it is not one that is based on considerations that were foreign to the case with which he had to deal. Rather it is based on considerations that were very germane thereto. I should note

1. (1910) 2 K. B. 165. 2. (1921) 3 K. B. 487.

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that it is not admitted that the petitioners stand to each other in the relation of superior and subordinate, but the Election Commissioner has found on the evidence that they bear such a relation to each other and there has been no argument before me as to that finding.

As far, then, as the objection is taken that the Election Commissioner has taken a wrong view of S. 49, these petitions must fail.

There is, however, another point taken, which concerns only the case of the 1st petitioner. This is that the Election Commissioner has declared his election to be void on a ground not taken in the petition against him. If such is the case, then the action of the Election Commissioner in setting aside his election and declaring the 1st respondent elected in his place will be one in excess of jurisdiction, as appears not only from *Ramaswami Goundan* v. *Muthuvelappa Gounder*[1], to which I have already referred, but also from *R. S. Naidu* v. *J. Ramier*[2], a more recent decision by Jackson, J., sitting alone. As far as the issue as to this matter goes the contention thus put forward for the 1st petitioner appears to be correct. This issue as framed in O. P. No. 34 is as follows: "Is the nomination of the 2nd respondent as a candidate invalid for the reasons stated in paragraph 4 (*e*) of the petition and is this Court entitled to go into that question?" and there is the same issue in O. P. No. 35, except that there respondent 2 becomes respondent 1, this person being the same as the present 2nd petitioner, Vrithambal Ammal and that cl. (4) (*e*) becomes cl. (4) (*c*). For the respondents it is contended that by some inadvertence this fourth issue has not been made applicable to the 1st petitioner also, but a reference to the pleadings shows that this contention is not well founded. The election of the two petitioners was sought to be set aside on a number of grounds, and a number of issues, apart from issue 4, were framed as to them. Some of them applied only to the 1st petitioner and some of them applied both to him and the 2nd petitioner, but none of them was pressed at the enquiry and the matter was argued only with reference to issue 4 which I have already quoted. Issue 4 is based on cl. (*e*) in the one case and cl. (*c*) in the other

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1. (1922) I. L. R. 46 Mad. 536: 44 M. L. J. 1.
2. (1926) 51 M. L. J. 701.

of para. 4 in the petitions, to the Election Officer. That clause as it appears in O. P. No. 34 runs as follows:—

" From the outset the election proceedings have been conducted and held contrary to the provisions of the Act and the rules framed thereunder, in so far as the 2nd respondent, who is a *dasi* of Sri Arunachaleswarar Temple, is the servant and subordinate of the 1st respondent who, as stated above, is the Executive Trustee having full control over the 2nd respondent, and, therefore, disqualified to stand as a candidate along with the 1st respondent. Consequently the 2nd respondent's nomination paper which has been improperly received should have been rejected by the 6th respondent who is therefore impleaded as a party."

Cl. (4) (*c*) in O. P. No. 35 is to a like effect, *mutatis mutandis* clearly the objection taken in this clause is only as to the position of the present 2nd petitioner and to her nomination paper which, on the grounds stated, is said to have been improperly received. It is true that there is a reference to the 1st petitioner, but this reference is only to show that the 2nd petitioner is disqualified to stand as a candidate along with him, in that he is an executive trustee having full control over her. The point taken is that she is disqualified because of him and not at all that he himself was disqualified to stand or should not have been nominated. This, then, is a case in which the Commissioner has not confined himself to an enquiry into the points raised in the petition. I may note that the Election Commissioner himself realised that under this issue he was dealing only with the case against the 2nd petitioner, as his conclusion is thus expressed: "I, therefore, find that the lady councillor should cease to be councillor under S. 50 (1) (*f*) also." From what has gone before, it is clear that what he meant by this was that he was deciding the matter with reference to S. 50 (1) (*f*) as well as to S. 49 (2) (*f*). A point has been taken that he should not have brought S. 50 (1) (*f*) into consideration, but I need not deal with this point, as it is sufficient that he had jurisdiction to deal with the matter under S. 49 (2) (*f*) and has disposed of it thereunder. That is the section with reference to which O. Ps. Nos. 34 and 35 of 1931 were brought. As to the matter of inadvertence I would observe that, if there has been any, it has been in only pressing the one issue though, for aught I know, that may have been due to quite other causes. The actual reason for pressing only the one issue has not been shown to me. In any case the 1st petitioner must have the benefit of the fact that the one issue that was pressed was one that did not tell against him.

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As I find that the Election Commissioner has acted in excess of his jurisdiction in declaring the election of the 1st petitioner, *i.e.*, the petitioner in C. M. P. No. 4040, void and in declaring that the 1st respondent of that petition had been elected, was passed without jurisdiction, I quash his order as to that, so that the election of the petitioner in C. M. P. No. 4040 will stand. That petition is, therefore, allowed with costs.

In the case of the 2nd petitioner, *i.e.*, the petitioner in C. M. P. No. 4335 of 1932, the result of the Election Commissioner's order is that a party who received 64 votes has been declared duly elected, thereby disfranchising the 160 voters who have voted for the 2nd petitioner in ignorance, it would appear, of his disqualification. Under R. 11 (2) the Election Commissioner had the option, if he declared the election of the 2nd petitioner void, either to declare that any other party to the petition who has under the rules claimed the seat has been elected, or to order a fresh election, and there is nothing in the rule to suggest that he is in any way restricted in the exercise of the option. It might have been better in such a case as this to order a fresh election but, if the Election Officer could in his discretion declare that the 2nd respondent was duly elected, then he was passing an order which he had jurisdiction to pass and the order cannot be interfered with by means of a writ. A reference has been made in this connection to *Gopala Aiyangar* v. *Ebrahim Rowthar*[1]. In that case, the District Judge, on setting aside the election of a party as Municipal Councillor because of a disqualification, ordered a fresh election. Another party, who had applied for being himself declared duly elected, came up on revision, contending that he was entitled to be so declared. The Full Bench dismissed the revision petition holding that a candidate who gets the next highest number of votes to the successful candidate who is disqualified is not entitled, as a matter of course, to be declared elected under the then Rule 12 which is identical in its terms with the present Rule 11. What was decided was that a candidate in such a position was not entitled, in such a case, to be declared elected and not that it was not permissible for the District Judge to pass either of the two orders which the rule allowed. I must find then that the Election Commissioner in declaring the

1. (1925) I. L. R. 48 Mad. 509 : 49 M. L. J. 606 (F. B.).

2nd respondent elected passed an order which was within his jurisdiction and that I cannot, therefore, interfere with it.

The result, then, is that C. M. P. No. 4335 of 1932 has to be and is dismissed with costs.

Pleaders' fee Rs. 200 on each petition.

C. M. P. No. 4040 of 1932 allowed.

B. V. V. *C. M. P. No. 4335 of 1932 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

S. R. M. M. Seetharaman Chettiar .. *Appellant* (1st Respondent)*

v.

A. R M. N. Chidambaram Chettiar and others .. *Respondents (Petitioners 1 and 2 and Respts. 2 and 3).*

Civil Procedure Code (V of 1908), S. 47—Representative of judgment-debtor—Transferee from Court auction-purchaser—Objection to execution under earlier decree—Application under S. 47—Procedure.

The appellant, who was the plaintiff in the earlier suit, attached before judgment certain immoveable property and subsequently, having obtained a decree in his suit filed an execution petition for bringing the attached property to sale. In the meantime, but subsequent to the attachment before judgment, the plaintiff in another suit against the same judgment-debtor brought the same property to sale in execution of the decree he had obtained, purchased it in court-auction and conveyed it to the respondent. The latter at first unsuccessfully asserted his right by filing a claim petition under O 21, R 90, Civil Procedure Code, and later on sought to resist the execution of the earlier decree by intervening under S. 47.

Held, that the respondent was the representative of the judgment-debtor, that the question raised was one relating to the execution of the decree and he could therefore intervene under S. 47 of the Code.

Veyindramuthu Pillai v. *Maya Nadan*, (1919) I. L. R. 43 Mad. 107: 38 M. L. J. 32 (F. B.), relied on.

Held, further, that the Court should itself decide the objection raised by the respondent and it had no option to refer the parties to a regular suit.

Appeal against the order of the Court of the Temporary Subordinate Judge of Devakotta, dated 16th August, 1928 and made in E. A. No. 91 of 1928 in E. P. No. 39 of 1927 in O. S. No. 39 of 1924, Sub-Court, Kumbakonam.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for appellant.

S. R. Muthuswami Aiyar for respondents.

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*C. M. As. Nos. 110 and 111 of 1929. 7th September, 1932.

Seetharaman Chettiar v. Chidambaram Chettiar.

Venkatasubba Rao, J.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—Before stating the point of law raised, it is necessary that I should set out briefly the facts which have given rise to these appeals. The decree that is under execution is the one passed in O. S. No. 39 of 1924. The plaintiff in that suit (the appellant) attached before judgment the immoveable property in question. Having obtained a decree in his suit, he has filed E. P. No. 39 of 1927 for the purpose of bringing the attached property to sale. In the meantime, but subsequent to the attachment before judgment, one Meyappan Ambalam filed O. S. No. 498 of 1924 against the same judgment-debtor and in execution of the decree he obtained, he brought the same property to sale, purchased it in court-auction and conveyed it to the respondent. As such purchaser, he is interested in resisting E. P. No. 39 of 1927 filed by the appellant. He first sought to assert his right by filing a claim petition under *O. 21, R. 58, Civil Procedure Code.* But that petition was summarily rejected on the ground that at the time of the attachment before judgment, the respondent had no right to the property and his claim petition therefore was unsustainable. Having failed in this, he had recourse to another method for asserting the same right, that is, he intervened in E.P. No. 39 of 1927 under *S 47, Civil Procedure Code,* claiming that as the representative of the judgment-debtor, he could assert his right to the property and resist the execution of the decree in O. S. No. 39 of 1924. The application he filed for the purpose was E.A. No. 91 of 1928. The first point that has to be decided is, whether the respondent is the representative of the judgment-debtor and whether he can intervene under S. 47. There can be no doubt that as the purchaser of the property belonging to the defendant, he should be regarded as his representative and the question is undoubtedly one relating to the execution of the decree. See *Veyindramuthu Pillai* v. *Maya Nadan*[1]. His application therefore under S. 47 was properly made and this is also the view taken by the Lower Court. Mr. Panchapagesa Sastri, the appellant's learned counsel, does not question the correctness of this part of the learned Judge's order. The question then arises: what was the proper procedure the Lower Court should have adopted, after it held that

1. (1919) I. L. R 43 M. 107: 38 M. L. J. 32 (F. B.).

Seetharaman Chettiar v. Chidambaram Chettiar.

Venkatasubba Rao, J.

the respondent could rightly come in under S. 47? The appellant's contention was that the decree obtained by Meyappan Ambalam was collusive and fraudulent, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continues to be in the possession of the latter. The Lower Court without deciding this question which is the subject of issues 1 and 3 framed by it, has referred the appellant to a regular suit for the purpose of getting rid of the decree obtained by Meyappa and the sale held in pursuance of it. It is this part of the order that Mr. Panchapagesa Sastri impugns. The learned Judge apparently seems to think that he has an option either to dispose of the application under S. 47 or refer the parties to a regular suit. In this he seems to be wrong. Is a question to be agitated under S. 47 or by a separate suit? Once it is held that resort to S. 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that provision. The first paragraph of the section shows that it is incumbent on the Court to decide the question referred to there under that very section. The words used are "shall be determined by the Court executing the decree and not by a separate suit". These words are imperative and vest no discretion in the Court. The second paragraph is no doubt not happily worded, but both the parts should be read together and the interpretation I have suggested is the only proper one. The order made by the Lower Court reads thus:

"Under the above circumstances, I would declare in E A. No. 91 of 1928, that the property sought to be sold in E. P. No. 39 of 1927 is not liable to be sold until the decree-holder gets the Court sale in favour of the vendor of the petitioner in E. A. No. 91 of 1928 set aside by a decree of Court and also obtains a declaration that the sale in favour of the petitioner in E. A. No. 91 of 1928 is benami for the judgment-debtor and is not valid and binding on him (the said decree-holder), and I would dismiss E. P. No. 39 of 1927 with a direction to the decree-holder (petitioner in the said E. P. No. 39 of 1927) to comply with the abovesaid direction before he seeks to bring the property to sale in execution of his decree."

This order cannot be sustained and the Lower Court should itself decide under S. 47 the question of fact raised by the appellant.

The respondent's counsel in supporting the Lower Court's order contends that an executing Court cannot take upon itself the responsibility of setting aside a decree passed by a competent Court. This argument is based upon a fallacy. In this case, the executing Court is not called on to pronounce upon the validity of the decree which it is executing. The respond-

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ent's title to the property depends upon some decree and the question is whether that decree is vitiated by fraud or collusion. That is not the decree which the Lower Court is executing and there is nothing to prevent it from deciding whether that was properly obtained or not, as incidental to the main question, namely, is the appellant's objection that the respondent is a benamidar well founded? The case relied upon by the respondent's learned counsel, *Venkatasami Naidu* v. *Gurusami Aiyar*[1], does not help him. The point under discussion did not arise for decision there. A suit had already been instituted and it was taken for granted that the parties were to be governed by the result of that suit.

The orders of the Lower Court are set aside and E. P. No. 39 of 1927 and E. A. No. 91 of 1928 are remanded to it for disposal in the light of these observations.

The appellant's conduct disentitles him to costs. He raised several objections in the Lower Court which were untenable and repeated them in the memorandum of appeal filed by him here. For this reason I direct each party to bear his costs of the appeal.

Reilly, J.

Reilly, J.—I agree. Mr. Muthuswami Aiyar for the Respondent here, that is the Petitioner in E. A. No. 91 of 1928, has maintained that his client rightly preferred that application to the Subordinate Judge's Court under S. 47 of the Code, and in that we agree with him. But he has gone on to contend that, although he came in rightly under that section, the Subordinate Judge had no jurisdiction to make any but one order on that application, *viz.*, that he was bound to give effect to the applicant's objection without going into the answer of the decree-holder in O. S. No. 39 of 1924, who was the execution-petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the decree-holder in O. S. No. 39 of 1924 was that Muthuswami Aiyar's client was merely a benamidar for the judgment-debtor in O. S. No. 39 of 1924, which would be an effective answer, if true. It is quite impossible for Mr. Muthuswami Aiyar to maintain that his client had the right to come in with a petition under S. 47 of the Code but that his opponent had no

1. (1919) 38 M. L. J. 441.

right to urge his answer and to claim that his answer should be heard under that section.

Seetharaman Chettiar v. Chidambaram Chettiar.

Reilly, J.

I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.

B. V. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Naranappier .. *Appellant* (1st Respondent)*

v.

Chidambaram Pillai and others .. *Respondents (Petitioner, Respondents Nos. 2 to 6, and added party Respondent).*

Naranappier v. Chidambaram Pillai.

Civil Procedure Code (V of 1908), S 64 and O. 21, R. 90—Person "whose interests are affected by the sale"—Transferee from judgment-debtor subsequent to attachment—Whether can apply to set aside Court sale.

A person to whom the judgment-debtor transfers the property subsequent to its attachment is one "whose interests are affected by the sale" within the meaning of O. 21, R. 90, Civil Procedure Code, and can apply to set aside the Court sale. The effect of S. 64 of the Code is to render such a transfer subject to the claims under the attachment and not to invalidate it altogether.

Appeal against the order, dated 27th April, 1931 and passed by the Court of the Subordinate Judge of Tiruvarur in E. A. No. 448 of 1930 in O. S. No. 44 of 1927.

T. M. Krishnaswami Aiyar, R. Kuppusami Aiyar and *R. Krishnaswami Aiyar* for appellant.

M. S. Venkatarama Aiyar, S. Ranganatham, K. S. Desikan, V. Rajagopala Aiyar and *T. V. Ramiah* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The Lower Court has made an order setting aside the sale of certain items under O. 21, R. 90, and the appellant complains against that order. The point of law raised is, that the petitioner before the Lower Court has no *locus standi* under the rule in question; in other words, that he is not a person "whose interests are affected by the sale". The property was sold in parcels and the decree-holder (the

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*C. M. A. No. 213 of 1931. 26th July, 1932.

Naranappier v. Chidambaram Pillai.

Venkatasubba Rao, J.

appellant before us) purchased lots 3 and 5; another, a stranger, purchased lots 1, 2, 4 and 6 and he has not appealed against the part of the order affecting him. The decree-holder alone has thus preferred this appeal and we are therefore concerned with the sale of only lots 3 and 5. The position of the applicant before the Lower Court (to whom I shall refer as the respondent) is this. Subsequent to the attachment which preceded the sale, he purchased certain items in lot 3 and certain other items in lot 2 with which we are not concerned. Thus, in regard to lot 3, he claims that he has a right to apply under R. 90, by reason of his purchase, which admittedly was made subsequent to the attachment. In regard to lot 5, the right he claims is a different one with which it is unnecessary to deal, in the view we have taken to which I shall refer presently.

The point of law argued is this: Is a person to whom the judgment-debtor transfers the property subsequent to its attachment entitled under R. 90 to apply to set aside the Court sale? That is to say, is he or is he not a person "whose interests are affected by the sale"? The answer is obvious, that the Court sale affects his interests; he is interested in the property fetching as high a price as possible, being the person entitled to any surplus remaining over, after the decree is satisfied. As a matter of fact, the respondent has acquired the entire interest of the judgment-debtor in the property and he is the person that suffers, if there be irregularity or fraud in connection with the Court sale. But Mr. T. M. Krishnaswami Aiyar for the appellant contends, that the sale to the respondent being subsequent to the attachment confers on him no right at all and that he has therefore no *locus standi* under R. 90. This argument which is professed to be based upon S. 64, Civil Procedure Code, overlooks its plain effect. In the first place, what the provision renders void, is not every transfer, but a transfer *contrary to the attachment*. The words "contrary to such attachment" were substituted in the present Code for words of much wider import "during the continuance of the attachment" in the Code of 1882. The expression in the old Code was too wide comprising as it did, alienations that could not possibly prejudice the rights of an attaching creditor; but under the present section, the question to be considered is, is the transfer contrary to the attachment? When its effect is not to defeat the attachment but is, on the other hand, subject to it, it cannot

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possibly be held to offend against the section. Secondly, the section does not provide that the transfer shall be void absolutely or without limitation but only "as against all claims enforceable under the attachment". That means, that the purchaser is subject to the same liabilities as the judgment-debtor was and that by reason of the transfer he does not get any higher rights. The transfer is, subject to the claims under the attachment, but surely to commit an irregularity or a fraud in the conduct of the sale, is not such a claim. I have not the slightest hesitation in holding that, so far as lot 3 is concerned, the respondent has made out his right.

Then arises the question of fact, namely, was there material irregularity or fraud in regard to the sale of item 3 by reason of which the applicant has sustained substantial injury?

[His Lordship discussed the evidence and held that lot 5 but not lot 3 had been sold for a grossly inadequate price.]

In the result, the appeal is dismissed as to lot 3 and allowed in respect of lot 5. The appellant and the 1st respondent here shall pay and receive proportionate costs throughout. In regard to lots 1, 2, 4 and 6 there is, as we have said, no appeal and the Lower Court's decision consequently stands.

Reilly, J.

Reilly, J.—I agree. I do not think there can be any doubt that the Petitioner before the Subordinate Judge, Chidambaram Pillai, was a person whose interests were affected by the sale within the meaning of Rule 90 of Order 21 of the Code of Civil Procedure. It is not now disputed that, after the attachment obtained by the Appellant before us, Naranappaier, in execution of his decree but before the sale with which this case is concerned, Chidambaram Pillai bought several items in lot 3. What he bought in that way he bought subject to Naranappaier's attachment. But that does not mean that his purchase was illegal or illusory. He bought in effect the surplus over any value which might be obtained by Naranappaier in execution under his attachment. Mr. T. M. Krishnaswami Aiyar suggested that, even if Chidambaram Pillai was a person whose interests were affected by the sale within the meaning of Rule 90 of Order 21, nevertheless S. 64 of the Code prevented him from attacking the sale in execution. But what S. 64 of the Code lays down, as my learned brother has pointed out, is that such a purchase as that

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of Chidambaram Pillai is void as against any claim enforceable under the attachment. That I understand to mean that his purchase cannot defeat or affect Naranappaier's right as attaching decree-holder to satisfy his decree out of the property attached. But I see no reason why that provision should shut out Chidambaram Pillai from any right as a person interested to show to the Court that by reason of some fraud or irregularity substantial loss had been caused to him by the property being sold in execution for less than its market-value.

That the price obtained in execution in this case for lot 3 and the other land which was sold in execution was much less than its market-value is, I agree with my learned brother, amply made out by the evidence in the case.

[His Lordship proceeded to deal with the evidence and concluded:]

In my opinion the finding that there was both fraud and irregularity, which resulted in substantial loss in respect of lot 3, cannot properly be upset by us and must be accepted.

In regard to lot 5 I agree with my learned brother that the evidence that the house comprised in that lot was really worth a great deal more than what was obtained for it at the auction-sale is not very satisfactory. The evidence is conflicting, and curiously enough it was not tested by cross-examination on either side. The learned Subordinate Judge, although he appears to have accepted the Petitioner's case in regard to the house, does not discuss that evidence in detail and does not give us any sufficient reason why he should believe the evidence of one side or the other. I agree with my learned brother that in the circumstances the evidence does not appear to be of sufficient value to justify the finding that substantial loss was caused in regard to lot 5, and therefore I agree that the appeal should be allowed in respect of that lot.

I agree also to the order proposed as to costs.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

R. Foulkes and another .. *Appellants** (*Respondents-Plaintiffs*)

v.

Kandasami Pillai *alias* Karuppiah Pillai and others .. *Respondents* (*Appellants-Defendants*).

Foulkes *v.* Kandasami Pillai.

Madras Estates Land Act (I of 1908), Ss. 25, 26 (3), 27, 28, 30, 42, 45 and 52 (3)—Variation of rent mentioned in patta claimed—Whether melvaramdar entitled to a different amount or rate of rent without fresh patta—Grants of lease whether can bind successors after lifetime of original grantors.

The only effect of there being a patta which remains in force by virtue of S 52 (3) so far as suits for rent are concerned is that, except in special cases falling under Ss. 25, 30, 42 and 45 which require the order of the Collector for determination of rent, the rent mentioned in the patta will, under Ss. 27 and 28, be presumed to be the proper rent until the contrary is shown. In other words, except in those excepted cases it is open to the landholder without tendering or exchanging or getting decreed a fresh patta to show to the Court in which the suit for rent is filed that he is legally entitled to a different amount or rate from that mentioned in the old patta.

Radhakrishna Aiyar v. *Sundaraswamier*, (1922) L. R. 49 I. A 211: I. L. R. 45 Mad. 475: 43 M. L. J. 323 (P. C.), considered and distinguished.

Sri Rajah Satrucherla Veerabhadra v. *Ganta Kumari Naidu*, (1912) 22 M. L. J. 451; *Muthiah Chettiar* v. *Periyan Kone*, 1920 M. W. N. 15; *Varada Reddi* v. *Srinivasa Mudaliar*, (1923) 45 M. L. J. 199; *Narayana Patrudu* v *Veerabhadra Raju*, (1927) I. L. R 51 Mad. 228: 54 M L. J. 564; *Mallayya* v. *Narayana Gajapathi Raju*, (1924) 21 L. W. 42 and *Solai Pillai* v. *Vedaji Baskara Tirumala Rao Sahib*, (1925) 23 L. W. 625, referred to.

Where it is indisputable that in a village rent was payable in kind and it is equally indisputable that the rates mentioned in the lease documents worked out at less than the value of the share of the produce representing the rent, those grants cannot bind under S. 26 (3) the successors of the grantors who have all died.

Appeals preferred under clause 13 of the Letters Patent against the judgment of the Honourable Mr. Justice Anantakrishna Aiyar, dated 19th December, 1929, in Second Appeals Nos. 540, etc. of 1928 preferred against the decrees of the District Court of Ramnad at Madura in A. S. Nos. 327, etc. of 1924 preferred against the decrees of the Court of the Special Deputy Collector of Manamadura in Summary Suits Nos. 737, etc. of 1922.

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*L. P. As. Nos. 26, etc. of 1930. 1st March, 1932.

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T. Rangachariar and *A. Srirangachari* for appellants.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for respondents.

The judgment of the Court was delivered by

Krishnan Pandalai, J.

Krishnan Pandalai, J.—These Letters Patent Appeals are from decisions of our learned colleague Anantakrishna Aiyar, J., in second appeals brought from a batch of suits brought in 1922 by the present appellants (plaintiffs) under S. 77 of the Estates Land Act for rent for faslis 1328, 1329 and 1330 against various ryots of a village called Puliyur in the Sivaganga zemindari of which the appellants (plaintiffs) are now by transfers, to which it is not necessary to refer, entitled to the melvaram and in which the respondents (defendants) are ryots. The suits were for 9/16ths of the rents due on each holding, to which share of rents the plaintiffs had become entitled by the said transfers; as to the other 7/16ths at the time of these suits there was a question between the plaintiffs and one Mayandi who had held the right to that share of rent under a farm lease executed by the predecessors-in-title of the plaintiffs, and that question had not been fully settled although we are informed that it was subsequently settled. The village had been a *varapathu* village, *i. e.*, one in which the customary rent was a share of the produce. The former owners of the melvaram, who had themselves got it by a grant from the zemindar in or about 1771, had become impoverished and had split up their interest into three shares and had farmed out the rent periodically. The first set of leases, Exhibits C and A, were to expire in 1905 and 1897; but even before their expiry the melvaramdars farmed out the rent for a further period by leases, Exhibits A-5 and C-3, two of which (as to 2/3) were to expire in fasli 1327 (1917) and the other (as to 1/3) in fasli 1322 (1912). These leasehold interests in the rent were all acquired by one Veeramani and from him by two of the ryots of the village, Govindaswami and Mayandi. In 1896, while the lease of rents was still outstanding, Govindaswami became the purchaser in Court auction of 1/8th of the melvaramdars' remaining interest. Govindaswami and Mayandi, who had in March, 1903, acquired the leasehold interest in the rents, entered into an agreement (Ex. H) in April, 1903, as to the division between themselves of the rents. It is admitted and

clear from the document that Mayandi was acting on behalf of himself and all the other ryots of the village in these transactions. The arrangement was that including the 1/8th share in the melvaramdars' interest of which Govindaswami had become owner, the share in the rents to which he was entitled was 9/16ths and Mayandi and those whom he represented were to receive the other 7/16ths according to the schedule attached to the document. By this agreement it was stipulated that the rents were to be collected and paid at certain money rates mentioned in the document and that payment at those rates was to be made whether the lands were or were not cultivated. Govindaswami was to collect his own 9/16ths share of the rents separately, and tender separate pattas in respect of that share. It was not necessary to tender pattas in respect of the other 7/16ths as Mayandi and his fellow-ryots were themselves to pay and receive the rent. The present appellants (plaintiffs) in 1905 purchased Govindaswami's ownership of 1/8th of the melvaramdars' right and also his interest in 9/16ths of the rents (Exhibits G and F) and in 1908 also bought from the melvaramdars themselves their ownership in the remaining 7/8ths.

Although there were other and minor matters in dispute, the main question in the suits was that arising from the plaintiffs' claim to varam rates. The plaintiffs' (appellants') case was that whatever arrangements as to converting the varam into money rents may have been entered into between the rent lessees, those arrangements terminated with the period of the rent leases in fasli 1327 and that thereafter the proprietor was entitled to rent according to the custom in the village. The ryots opposed this claim. Eighteen issues were framed. Only a few of them are now material, and that relating to the plaintiffs' claim for varam rents was the third issue. The Special Deputy Collector found that the defendants' contention that the village was never a *varapathu* one was at once false and frivolous and decided the issue in plaintiffs' favour. On his finding on the other issues he gave a decree to the plaintiffs subject to small modifications. The ryots took the matter in appeal to the District Judge of Ramnad. In the appeal the ryots questioned the right of the plaintiffs (appellants) to claim varam rates on several grounds, namely, (1) that the plaintiffs according to the agreement of 1903 (Ex. H) could only claim varam rates after the whole of the *maramath* expenses due to the ryots had been paid off.

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Krishnan Pandalai, J.

(This was based on the fact as stated above that the *maramath* expenses due on Mayandi's 7/16ths share were still in litigation); (2) that the plaintiffs were not entitled to varam rates at least on about 35 cheis of land in respect of which the ryots claimed permanent cowle rights under certain instruments, Exhibits I to VIII, which the original proprietors had executed; and (3) that the plaintiffs were not so entitled without having previously brought suits for enforcing pattas at the new rates claimed and for this the decision in *Sreenivasa Aiyangar* v. *Abdul Rahim Sahib*[1] was relied upon. The District Judge rejected these contentions and confirmed the decree of the Deputy Collector. The plaintiffs' memorandum of objections was also disallowed, except as to lands included in certain *othis* for which the Deputy Collector had allowed exemption and the Judge thought that that exemption was not due.

The ryots took up the matter in second appeal. From the judgment of Anantakrishna Aiyar, J., it is seen that only four points were discussed at the hearing. Of these the fourth point concerned the *othis* which the Deputy Collector had allowed in favour of the ryots but which were disallowed by the District Judge. It was admitted in second appeal that the disallowance by the District Judge was wrong and that on this point the judgment of the Deputy Collector should be restored. That point is not now before us. The remaining three points were: first, that by virtue of the agreement of 1903 (Exhibit H) the landholder was not entitled to demand any rent over and above the rates mentioned therein until after the whole of the *maramath* expenses had been paid off. This was the point which had been disallowed by both the Deputy Collector and the District Judge. The learned Judge also disallowed it and confirmed the opinion of both the Lower Courts on the ground that the agreement, Exhibit H, was in fact and in substance between the lessees for their own convenience and intended to last only during the period of the lease, that it had effected a severance of the leasehold interest as between the lessees, that, though the landholder was not bound to recognise the severance, he was entitled to recognise it and that the plaintiffs having in fact become entitled to 9/16ths of the leasehold interest and also to

1. (1917) 6 L. W. 108.

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the proprietorship of the landholder's interest and paid off the *maramath* expenses to Govindaswami, who was entitled thereto, were entitled to demand rent from the ryots in respect of that share. The second point was an entirely new point which had not been taken in either of the Courts below and turned upon the effect of S. 52 (3) of the Estates Land Act. The contention was that the plaintiffs having till fasli 1327 tendered pattas on the basis of the rates of rent in Exhibit H. those rates continued to be in force until fresh pattas and muchilikas were accepted, exchanged or decreed. It was admitted that the plaintiffs had tendered pattas till fasli 1327 as urged by the ryots. The learned Judge, while recognising that this point had not been taken in either of the two Courts below, allowed it to be taken as it was a point of law depending on admitted facts. On it he decided in favour of the ryots holding that the effect of S. 52 (3) is that where pattas and muchilikas are exchanged for any revenue-year, the landholder cannot bring a suit for rent other than the rent mentioned in the pattas for any subsequent year unless and until he has exchanged or obtained decrees for fresh pattas at the new rate. The consequence of this opinion was that the plaintiffs (landholders) were entitled to rents only at the rate mentioned in Exhibit H. The learned Judge accordingly modified the decrees to that extent. The third point was that the plaintiffs are not entitled to any rent at all in the lands covered by Exhibits I to VIII (35 cheis) as they had been granted away on permanent cowle by the original proprietors. This was the same point which had been unsuccessfully urged in both the Lower Courts. The learned Judge rejected this contention of the ryots and confirmed the opinion on that subject of the Lower Courts. The result was that the decrees were modified to the extent required by the learned Judge's opinion on points 4 and 2.

In this appeal under the Letters Patent the plaintiffs (appellants) urge that the learned Judge's view as to the second point, *i e.,* the effect of S. 52 (3) is wrong, and the respondents have filed a memorandum of objections urging again the points 1 and 3 mentioned above.

For the sake of convenience we will at once dispose of the points 1 and 3 urged by the respondents. We agree with the Lower Courts in their rejection of these contentions. The first point is that the leases should be taken to continue until the

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amounts spent by the lessees in respect of the *maramath* were paid and as the *maramath* expenses in respect of Mayandi's 7/16ths share had not been paid on the date of suit the plaintiffs are entitled only to the rent provided by Exhibit H as pointed out by the learned Judge. This ignores the fact that the lessees themselves had severed their interests under the leases, including the right to the *maramath* expenses, and the plaintiffs had become entitled to 9/16ths, and Mayandi and the other ryots to 7/16ths. Govindaswami's shares (9/16ths) of the *maramath* expenses having been paid to him and all his other interests in the leases having been transferred to the plaintiffs and the leases themselves having run out by expiration of time, it is not clear why the plaintiffs are not entitled to demand from the ryots 9/16ths of the rents if those rents are otherwise due or why the dispute between Mayandi and those whom he represented and the plaintiffs in respect of the *maramath* expenses 7/16ths share should have any effect on the present claim. We see no substance in this objection. The third point relates to the rights claimed by the ryots under Exhibits I to VIII which they say amount to permanent cowles, *i. e.*, permanent alienations of the melvaram interest by the melvaramdars reserving only a small quit-rent. The Deputy Collector and the District Judge rejected this argument on the ground that these so-called cowles were never intended to be operative and were never operative. The learned Judge came to the same conclusion but on a different ground. He says that there are no words appropriate to the grant of an inam in those documents and that construing them as instruments permanently settling the rents at the rates mentioned therein they could not bind the successors of the persons who granted them by reason of S. 26 (2) of the Estates Land Act. We have had these documents read to us in the original, and we are clearly of opinion that they are not permanent cowles, *i.e.*, transfers of the melvaram interest in favour of the transferees. These documents were all executed by one or other of the three sharers of the melvaram interest in favour of ryots, permanently fixing a money rent at certain rates on their holdings during the pendency of the leases of rent which were to last till faslis 1327 and 1322. At the time these documents were executed therefore, the executants were only entitled to the rents after faslis 1322 and 1327; in the meanwhile they were

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entitled only to the poruppu or jodi reserved by the lease. What, however, these so-called cowles purport to do is to fix the rents at a money rate permanently. It must be remembered that at that time the rents were payable in kind to the lessees and the melvaramdars were not entitled to the rents either in kind or in money. The rates fixed in these instruments are as stated by the District Judge in paragraph 18 much below the rates fixed in Exhibit H in 1903 by the lessees with the concurrence or on behalf of the ryots. To overcome this difficulty the ryots now say that the rates mentioned in these documents were to come into force only after fasli 1327. We are satisfied that these documents represent attempts by the then ryots to induce the impecunious melvaramdars to permanently fix the rent in money at a lower rate than was the custom of the estate. The melvaramdars had nothing to lose by this transaction so long as the leases then outstanding were in force and as the leases would expire only in fasli 1327 (1917) the melvaramdars were apparently induced to sign away rights which they themselves could never hope to enjoy and upon which they therefore placed no value. This is a kind of transaction which S. 26 (3) is aimed against. It says:

"Except as provided by sub-s. (1) (that is, where the land in an estate is given on favourable terms for clearing or bringing waste land into cultivation, etc.) no rate of rent at which the land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land."

It is indisputable that in this village rent was payable in kind. It is equally indisputable that the rates mentioned in these documents work out at less than the value of the share of the produce representing the rent. Therefore those grants cannot bind the successors of the grantors who have all admittedly died. The plaintiffs are claiming not through them but from their successors. We agree with the learned Judge on this point.

The real and substantial point in the appeal is that raised by the appellants on the effect of S. 52 (3) on these suits. Our first observation on this is that in allowing this contention to be raised at the stage in which the cases were before him the learned Judge lost sight of the fact that the plaintiffs were thereby being called upon to meet an objection in the year 1929 which, if it had been raised in the suits when they were brought

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in 1922, might have been adequately remedied at least as regards the years subsequent to those for which rents are now being claimed. But as it is, if the point taken before the Judge prevails, as we are speaking in 1932, the plaintiffs have for ever lost without any hope of recovery, their chance of realising the proper rent for at least 10 years after the suits and this on account of allowing the ryots to take an objection at the last stage which they ought to have taken at first. Speaking for ourselves we would have felt justified in declining to allow the contention which the learned Judge permitted. But as he has permitted it, we must examine it.

In short, the learned Judge's view as to the effect of S. 52 (3) is that where a patta and a muchilika have been exchanged between a landholder and a ryot the former cannot in any subsequent year demand rent other than what is mentioned in the patta except after getting a fresh patta and muchilika accepted, exchanged or decreed mentioning the new rent claimed. We are of opinion that this view is incorrect and that the learned Judge has given a meaning to the words "shall remain in force" which they were not intended to bear when in a suit for rent facts are proved which show that the old rent should no longer remain in force.

It is well known that under S. 7 of the Rent Recovery Act (VIII of 1865) no terms of the tenancy including rent could be enforced unless pattas and muchilikas had been exchanged for the year for which the rent was claimed. This led to great inconvenience. One of the changes brought about by the Estates Land Act was to alter this. Ss. 52 and 53 are the sections by which the alteration was brought about. S. 52, speaking broadly, deals with the time or period during which a patta and a muchilika once exchanged may remain in force. It deals with nothing more. Its provisions are that although pattas and muchilikas may be for more than one year neither party can be compelled to tender or accept a patta for more than one year. The demand for a patta or a muchilika is to be made within the year for which it is intended. Pattas and muchilikas remain in force till the beginning of the next year during which a fresh patta and muchilika are accepted, exchanged or decreed. But if in the second year no fresh patta and muchilika are brought into effect the previous year's patta runs on and remains in force until the commencement of the

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year next after that in which a fresh patta is tendered, accepted, exchanged or decreed. In other words, if a patta has been allowed to run on for two years and in the third year a fresh patta and muchilika are exchanged, that patta will come into force only at the beginning of the fourth year. These are the provisions designed to do away with the old requisite for a fresh patta during every year when rent was to be sued for. S. 52 says nothing about the effect and consequences of the patta remaining in force. S. 53 to a certain extent deals with this. It says that unless a patta and muchilika have been exchanged for the period or unless there is a previous patta and a muchilika continuing in force under the provisions of S. 52, no landholder can proceed against a ryot for rent by distraint and sale of his moveable property or by sale of his holding under Chapter VI. Sub-sec. (2) says that even for those limited purposes the patta which is tendered may be partially good even though some of its provisions are not valid, so as to enable the landholder to recover rent by distraint and sale of moveable property and of the holding to the extent to which the rent is due, *Raghunatha Row Sahib* v. *Vellamoonji Goundan*[1]. Reading these sections together, it seems to us that the consequence of a valid patta continuing in force by reason of S. 53 is only that the landholder cannot distrain on the ryot's moveables or sell his holding except for the amount mentioned in the patta. Nowhere in the Act is it stated that in suits for rent under S. 77 for the purpose of determining the proper rent the rent mentioned in the previous patta is conclusive and that the only way for demanding a different amount except under certain sections, such as 25, 30, 42 and 45, is to have previously exchanged a fresh patta and muchilika. In our opinion the only effect of there being a patta which remains in force by virtue of S. 52 (3) so far as suits for rent are concerned is that, except in special cases falling under Ss. 25, 30, 42 and 45 which require the order of the Collector for determination of rent, the rent mentioned in the patta will under Ss. 27 and 28 be presumed to be the proper rent until the contrary is shown. In other words, except in those excepted cases it is open to the landholder without tendering or exchanging or getting decreed a fresh patta to show to the Court in which the suit for rent is

1. (1914) I. L. R. 38 Mad. 1140: 27 M. L. J. 597.

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filed that he is legally entitled to a different amount or rate of rent from that mentioned in the old patta.

In *Sri Rajah Satrucherla Veerabhadra* v. *Ganta Kumari Naidu*[1] it was decided that S. 53 has dispensed with the tender of a patta as a condition for suits for enforcing the terms of the tenancy except by distraint or sale of the holding. The present suits are suits for reverting to what has been proved to be the proper rent of the village, namely, varam rents. All the Courts have held that the plaintiffs are so entitled and it is obvious that this is not a suit for enhancement in the proper sense of the term. In *Muthiah Chettiar* v. *Periyan Kone*[2] it was held that a landlord is entitled to revert to the varam rent if it was the accepted mode and no implied agreement to the contrary could be inferred by payment of money rent varying in amount from year to year for a number of years. In *Varada Reddi* v. *Srinivasa Mudaliar*[3] it was held that the landholder is entitled to revert to the varam system unless the ryots establish a contract to the contrary and that evidence of payment of money rent under short term pattas which contain clauses to revert to the varam system at the end of the period is not sufficient evidence of a contract to the contrary. It is thus clear that the ryots have no answer in these cases to the plaintiffs' claim to revert to the varam rents and so far as Ss. 27 and 28 are concerned, the Courts have held that the plaintiffs have proved the contrary by proof of their right to revert to the varam system.

In *Narayana Patrudu* v. *Veerabhadra Raju*[4] it was held that under S. 77 of the Act in cases not falling within Ss. 25, 30 or 45 of the Act, suits for recovery of unascertained rent will lie and the Court must ascertain the amount as there is no previous proceeding provided by the Act for the ascertainment of rent in such cases. To the same effect is the decision in *Mallayya* v. *Narayana Gajapathi Raju*[5]. In *Sreenivasa Aiyangar* v. *Abdul Rahim Sahib*[6] a landholder sued for increased rent on the ground of increased area discovered on re-survey, and it was held that the increased rate could not be claimed because S. 42

1. (1912) 22 M. L. J. 451. 2. 1920 M. W. N. 15.
3. (1923) 45 M. L. J. 199.
4. (1927) I. L. R. 51 Mad. 228 : 54 M. L. J. 564.
5. (1924) 21 L. W. 42. 6. (1917) 6 L. W. 108.

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expressly provides for the order of the Collector in such cases. Some remarks of Napier, J., of a wider application which have been relied on by the respondents in this case were expressly dissented from in *Solai Pillai* v. *Vedaji Baskara Tirumala Rao Sahib*[1] and we think that that dissent was justified.

The above decisions and considerations do not appear to have been drawn to the learned Judge's attention. He, however, refers to and relies upon the decision of the Privy Council in *Radhakrishna Aiyar* v. *Sundaraswamier*[2] on appeal from this High Court in *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[3]. He draws the inference from the language of their Lordships in that case that the policy underlying the Estates Land Act is to require that only such rents shall be decreed as are mentioned in a previously existing patta which remains in force under S. 52. We think that neither the facts of the case nor the language used by their Lordships is capable of this inference. In that case which also was a case of rent payable in kind there had been pattas and muchilikas enforced under the orders of the Revenue Court when the Rent Recovery Act was in force. The 8th clause in those pattas enabled the landholder if the ryots had removed the harvest without paying the landholder's share or giving him an opportunity of inspecting it to demand rent at a particular rate in kind. It appeared that for several years the ryots had got into the habit of removing the harvest and the landholder had winked at it and accepted rent at a lower rate than that fixed by the above clause. After the Estates Land Act came into force the landholder had tendered pattas with the above clause which were rejected by the ryots. Then suits were brought for rent at the rate mentioned in Cl. 8. The principal question was whether pattas decreed by the Revenue Courts under the Rent Recovery Act came within the description of the "pattas decreed" in S. 52 (3) of the Estates Land Act so as to constitute them pattas remaining in force until fresh pattas are accepted, exchanged or decreed. While the landholder contended that pattas decreed under the old Act are as binding as those decreed under the new Act, the ryots contended that the matter was not *res judicata* because the jurisdiction of the two kinds of Courts was different.

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1. (1925) 23 L. W. 625.
2. (1922) L. R. 49 I A. 211: I L. R. 45 Mad. 475: 43 M.L.J. 323 (P. C.).
3. (1916) 6 L. W. 16.

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It was on this point that the decision turned. If the landholder's contention was adopted as it was by the High Court and the Privy Council he was entitled to enforce Cl. 8. If not, the question would have to be tried afresh what was to happen if the ryots removed the harvest without paying the usual rent. In these circumstances this Court held that though the general doctrine of *res judicata* is not in question there is no reason for restricting the scope of the general reference to muchilikas decreed in S. 52 (3) to those decreed by any particular description of Court. Therefore the pattas decreed under the old Act remained in force under the new Act and with them the disputed Cl. 8. This view was upheld by the Privy Council. Their Lordships begin the discussion of this point at page 481 by pointing out that the dispute had to be determined on the terms of the Estates Land Act and this, in view of the ryot's contention that for a period of 20 years the rates mentioned in Cl. 8 had not been demanded. Their Lordships held that this was not sufficient to derogate from the landholder's right to enforce Cl. 8 if it was otherwise found binding. Their Lordships then consider the argument based on *res judicata* and state confirming the view of the High Court and indeed quoting it with approval that it was not a case of *res judicata* in the proper sense but of construction of S. 52 (3) of the Estates Land Act where it is said that muchilikas decreed in any revenue year remain in force until fresh ones are exchanged or decreed. They held that muchilikas decreed under the old Act were included within this expression and decided the point. But it is pertinent to remark that they go on to observe that

> "it stands to reason and it is in accordance with Ss. 27 and 28 that the old rent thus decreed shall continue until reduced or enhanced by special applications under the statute. No such applications have been made."

Their Lordships here recognise that the terms of the previous pattas including the rents mentioned therein remained in force until they are shown to be inapplicable by reference to Ss. 27 and 28 which raise the presumption that till those rents are shown to be inapplicable they should be presumed to be fair. It is in our opinion wrong to construe this language of their Lordships as if they were exhaustively enumerating the modes of showing how the old rents have become inapplicable and laying down that enhancement and reduction

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are the only two methods. That was not the question their Lordships were considering and they cannot be held to have decided what was not necessary to decide,—in what ways the old rent may have become no longer applicable to the period in question which are neither enhancement nor reduction of rent. For instance, a favourable rate of rent granted by a deceased landholder may have ceased to be operative by reason of S 26 (3) after his death or as in this case the lessce of rents in a *varapathu* village having during his lease accepted money rents from the ryots the lease may have expired and then the proprietor being restored to his rights may be entitled to rent in kind. Their Lordships could not have decided that these are not grounds under Ss. 27 and 28 for showing that the rents as mentioned in old pattas are no longer applicable. We think therefore that this decision affords no support to the learned Judge's view on the question before us.

We accordingly set aside the decision of the learned Judge on this point. The result is that the decree of the learned Judge will be modified by awarding the plaintiffs the rent as sued for in the several cases in accordance with the above opinion. In other respects the learned Judge's decree is confirmed. The appellants have substantially won throughout. The learned Judge's reason for not awarding either party costs is that the defendants sprung upon the plaintiffs a point in the second appellate Court on which they won. This ground being now shown to be erroneous there is no reason for not maintaining the usual order as to costs which was passed by the District Judge. We confirm the order passed by the District Judge as to costs of the first and the first appellate Court. The respondents must pay the appellants their costs both in this and in the second appellate Court. The memorandum of objections is dismissed without costs.

Vakil's fees in the 23 appeals and L. P. appeals are fixed at Rs. 230 in each payable equally by each of the defendants in the twenty-three cases.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VEPA RAMESAM, *Kt.*, *Officiating Chief Justice* AND MR. JUSTICE CORNISH.

The Secretary of State for India in Council represented by the Collector of Salem .. *Appellant* in Appeals Nos. 217 to 229 of 1929 and Respt. in Appeal No. 443 of 1929 (Respt.)*

v.

R. Narayanaswami Chettiar and others.. *Respondents (Claimants) in all appeals.*

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Madras Town Planning Act (VII of 1920), Ss. 12, 14 and 35—Town planning scheme called for by Government and submitted by Municipal Council—Government notification of acceptance—Power of Local Government to extend time fixed under S. 12—Date to be adopted for assessment—Order on reference under Land Acquisition Act (I of 1894)—Whether a decree—Appealability under S. 49 of the Act.

Where the Government in February, 1921, required under S. 12 of the Madras Town Planning Act a Municipal Council to submit a town planning scheme within three months, and the Council sent the scheme in August, 1921 and the Government accepted it by notification under S. 14 of the Act in September, 1923, on questions whether the Local Government could extend time and which of the dates either February, 1921 or September, 1923, should be taken for the purpose of determining the amount of compensation to be awarded for the land acquired under the Act,

Held, that the Local Government had ample power by notification to extend the time fixed by them under S. 12 of the Town Planning Act, but in view of their Lordships affirming the award of the District Judge, the discussion of the dates became purely academic.

Per *Ramesam, Offg. C. J.*—Though the Council failed to submit the scheme within the prescribed period, still the Government has got the power to direct the Council to again submit a scheme, and though in the present case there is no such requisition, still the notification by Government in September, 1923, must be deemed to be such requisition and hence September, 1923, should afford the date for assessment of market-value.

Per *Cornish, J.*—The mere failure of the Council to submit the scheme within time not fixed by the Act but fixed by the Government will not render the original requisition to lapse; but the acceptance of the scheme submitted later must have reference to the original requisition under S. 12 of the Town Planning Act and hence the material date is February, 1921.

Held also that the decision of a Court on a reference to it under S. 49 of the Land Acquisition Act was a decree and as such appealable.

Decisions contrary, prior to the amendment of the Act, is no longer good law.

Appeals against the awards of the District Court of Salem in Land Acquisition Cases Nos. 27, 29, 30, 28, 32, 33, 35, 34, 36 to 40 and 37 of 1926, respectively.

The Government Pleader (P. Venkataramana Rao) for appellant.

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*Appeals Nos. 217 to 229 and 443 of 1929. 11th August, 1931.

B. Sitarama Rao, K. Bhashyam Aiyangar, V. Ganapati Aiyar, T. R. Srinivasan, K. R. R. Sastri and *K. Sankara Sastri* for respondents.

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The Court delivered the following

JUDGMENTS. *Ramesam, Offg. C. J.*—These are appeals against the award of the District Judge of Salem made in certain land acquisition proceedings which were taken pursuant to the Town Planning Act (VII of 1920). The scheme was generally known as Maravaneri Extension and was intended to enlarge the accommodation of Salem Town. The facts of the case may now be stated.

On 1st February, 1921, the Madras Government invited the Municipal Council of Salem by a notification published in the *Fort St. George Gazette* to submit for their sanction within three months from the date of the publication of the notification a scheme in respect of the area now in question (Ex. A). This was under S. 12 of the Town Planning Act. That section authorises the Government to fix a date within which the Municipal Council should submit the scheme and the Government fixed three months as the period. The Salem Municipal Council did not submit their scheme within three months. The draft scheme was submitted on 28th August, 1921 (Ex. B). Seeing that the Government ultimately published a notification on 21st September, 1923, under S. 14 (3) of the Act (*vide* Exhibit D) we must assume that the Madras Government has accepted the draft scheme though it was submitted late and condoned the delay of the Municipal Council. S. 34 of the Town Planning Act provides that a notification under S. 14 of that Act shall operate in respect of any land covered by it as a declaration under S. 6 of the Land Acquisition Act. So further proceedings were taken under the Land Acquisition Act. An Acquisition Officer was appointed and he made an award on 2nd September, 1926. Many of the claimants were not satisfied with it and required a reference to the Civil Court under S. 18 of the Land Acquisition Act. It was thus that the matter came up before the District Judge of Salem and against his award these appeals are filed by the Government and one claimant.

The District Judge held that, as the Salem Municipal Council had not complied with the notification of the Govern-

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ment within three months as required in Ex. A. the notification became spent as it were and any action taken by the Municipal Council subsequently for the purpose of settling a scheme and getting the approval of the Government could not be regarded as one under S. 12 of the Town Planning Act. He then observed that the Government had no power to extend the time mentioned in the notification and therefore the notification, Ex. A, had no legal effect whatever; but he also held that the subsequent proceedings taken under the Act were still valid. He pointed out that, apart from the notification under S. 12, the Municipal Council could *suo motu* frame a scheme under S. 10 (3) or S. 11 and the Government may approve of the scheme under S. 14 (3) and further proceedings can follow a notification by the Government under S. 14 of the Act. He finally held that though the notification under S. 12 lapsed and there was no notification under S. 10 (1), and therefore S. 35 (2) (*a*) of the Town Planning Act could not be applied, the notification under S. 14 could still be utilised for a date to calculate the values. Under S. 23 of the Land Acquisition Act the market-value of the land on the date of the publication of the declaration under S. 6 must be taken into consideration. Under S. 34 of the Town Planning Act the notification published under S. 14 of the Town Planning Act is itself deemed to be a declaration under S. 6 of the Land Acquisition Act. He therefore held that 21st September, 1923, the date of Ex. D, the final notification under S. 14, must be taken to be the date at which the value of the plots belonging to the claimants should be ascertained. and he proceeded to give his award This conclusion is challenged by the learned Government Pleader. He cited some cases before us to show that the District Judge had no jurisdiction to go behind the reference. But I do not think that this point arises before us. The learned District Judge did not say that the reference to him was invalid, nor is any such proposition contended for by the respondents. The District Judge held that the notification under S. 14 was a valid notification and the further proceedings were valid. All that he said was that there was no notification under S. 10 (1), nor any operative notification under S. 12 of the Town Planning Act, and therefore S. 35 (2) (*a*) could not be applied. He therefore chose the notification under S. 14 which is equivalent to a declaration under S. 6 of the Land Acquisition Act and proceeded to

estimate the value as on that date. It is therefore unnecessary to consider the cases cited by the learned Government Pleader.

The next question is whether there was an operative notification under S. 12 so that we might take its date as the date with reference to which the lands have to be estimated under S 35 (2) (*a*) of the Town Planning Act. Now, taking S. 14 of the Act, cl. (1) refers to the date of the publication of a draft scheme. It is clear that there are two draft schemes referred to in the prior sections of the Act, one published by the Municipal Council under S. 11 *suo motu* and another prepared by the Council under S. 12 on the invitation of the Government. It seems as if both the Ss. 13 and 14 were intended to apply to both kinds of draft schemes. But unfortunately S. 12 did not make any provision for the publication of the draft scheme as S. 11 did, with the result that the words "the date of the publication of a draft scheme" cannot refer to the publication of a scheme under S. 12. Nevertheless S. 14 (3) may refer to a draft scheme under S. 11 (1) or a draft scheme submitted under S. 12. This is the view adopted by the learned District Judge, and also contended for before us by the learned Government Pleader. I agree with this contention. This defect in S. 12 has since been remedied by an amending Act and now it is clear that S. 14 (1) applies to draft schemes under S, 11 or S. 12 and the original intention is now properly carried out. But this conclusion that S. 14 (3) applies even to a draft scheme prepared *suo motu* by the Municipal Council and therefore the proceedings under the Town Planning Act are valid does not solve the question of the date of the notification which has to be adopted under S. 35 (2) (*a*). The District Judge thought that the Government had no power to extend the time mentioned in its notification of February, 1921. The learned Government Pleader argues that this view is not correct. To this extent I agree with the learned Government Pleader. In the first place, the Act itself does not fix any period of time before which the scheme must be submitted by the Municipal Council. The date was to be fixed by the Government. The Government had so fixed the date, but the Municipal Council did not submit its scheme within that date. If at this stage the Government sent another communication to the Municipal Council fixing another date and published it by a notification, it will be perfectly valid. Only in such a case the date of the second notification would be the date to be adopted under S. 35 (2) (*a*). Whether we call

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it an extension of the original date or whether we call it a fresh notification it matters little. But what the learned Government Pleader requires for his argument is that while an extension of the original date may be made by the Government, the date of the first notification, the time prescribed in which is extended, is still the date to be adopted under S. 35 (2) (*a*). I am unable to agree with this contention. The whole policy of the Act is that a reasonable date should be fixed within which the Council should submit its scheme and this date should be notified by the Government. If the Council submits its scheme within that date, the proceedings will continue with reasonable speed and the owners of lands will have the satisfaction of their lands being acquired and prices given to them corresponding to a date not unreasonably remote from the actual acquisition; but if delay is committed by the Municipal Council and if the Government extends the time, for the same reason for which the first notification mentioning a date for the submission of the scheme by the Municipal Council should be published, there must be a notification containing the second date and this notification should be equally published. What the Act contemplates under S. 35 (2) (*a*) is the date of a notification which prescribes a date within which the Municipal Council should act and has acted. The date of Ex. A does not satisfy this condition. The Act does not expressly speak of any power in the Local Government to extend. As the sections are worded the Act contemplates that the Council has to take action within the time mentioned by the Government, but as I said an extension can always be granted by a further notification. If so, the date of the further notification will be the date to be adopted under S. 35 (2) (*a*). Now, the final notification of the Government of September, 1923 (Ex. D) certainly shows that the Government was willing to condone the delay of the Salem Municipal Council and accept the scheme submitted by the Council and by some straining of language it may be regarded as a notification under S. 12, though in such a view we have got a merger of the notification under S. 12 and the notification under S. 14 (4); but I do not see anything illegal in it, though this was not what was contemplated by the Act In this view I am willing to say that the proceedings validly continued under the Town Planning Act and the date to be utilised under S. 35 (2) (*a*) is 21st September, 1923, and we

need not fall back upon the date fixed by the Land Acquisition Act. I might add that, if this view of mine is not permissible, the only alternative view, in my opinion, seems to be that adopted by the District Judge.

But it seems to me that the whole discussion is academic. In my opinion there is plenty of documentary evidence in the case showing that on 1st February, 1921, the rate of 0-2-3 a sq. ft. should be adopted as the value of the lands.

[After discussing the evidence regarding the rate, His Lordship proceeded:]

This disposes of all the appeals in which special points were raised except Appeals Nos. 226 and 443 which are cross-appeals in the same case, namely, L. A. C. No. 37. It will be convenient to take up these two appeals separately. The other appeals are dismissed with costs.

In these two appeals (Nos. 226 and 443) the facts are these: One of the suggested roads according to the Town Planning Scheme cuts off a corner of the house of Mr. R. Srinivasa Rao, an Advocate. The frontage of the house is on the western side and the road cuts off a slice in the backyard on the eastern side. When the proposal originally became known, the claimant pointed out the inconvenience caused to the house, and it was then thought that the Municipal Council should address the Government for a diversion of the proposed road. It may be mentioned here that an extension was made to the main building in about May, 1925, by the addition of a kitchen. The proposed road does not encroach on the kitchen but runs by the side of it. When the Municipal Council recommended a diversion of the road to the Local Government, the owner of another plot objected to the diversion as it caused him considerable inconvenience. The Government passed orders to the effect that unless the Municipal Council enters into an agreement with all the persons affected by the diversion the Government cannot approve of the diversion proposed. This was on 8th December, 1926. The claimant apparently anticipating that the Government would not sanction the diversion, filed his statement on 29th September, 1926, before the Land Acquisition Officer in which he prayed that his whole house might be acquired under S. 49 of the Land Acquisition Act. The Land Acquisition Officer deals with this matter in paragraph 24 of his award. He says:

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"In response to the notice under Ss. 9 and 10 of the Act, Vakil R. Srinivasa Rao states that he has moved the Municipal Council about diverting the road at this spot and that the question of acquisition may be deferred till the Municipality decides the matter."

It does not appear when this statement was made. The Land Acquisition Officer then says that the Council have since approved of the deviation. But the statement of the claimant and the approval of the Council must have been prior to the date of the award, namely, 2nd September. The Land Acquisition Officer then observes:

"As however it involves a variation of the scheme sanctioned by Government the deviation cannot be acted upon without Government sanction."

Then he proceeds to dispose of the matter. The award of the Land Acquisition Officer does not clearly show whether he passed any order deferring the question of this particular acquisition till the Municipality decided the matter as was requested by the claimant. The next sentence of the Officer suggests that he did defer his own enquiry until the Municipality decided the question. If so, it is not clear whether he gave a further notice to the claimant saying that there was no use of a fresh adjournment as the deviation cannot be acted upon without Government sanction. The sanction of the Government has been applied for by the Municipal Council on 21st November long after the award (Ex. III). So at the time of the award there was no application made by the Municipal Council to the Government. But it seems to me that the Land Acquisition Officer ought at least to have informed the claimant that further adjournment of the matter would be useless and he would proceed with it. It does not appear that he has given any such notice. It cannot therefore be said that the request of the claimant in his statement of 29th September was made too late. On the request of the claimant the matter was simply forwarded by the Land Acquisition Officer to the District Judge. The learned District Judge held that this was not a case in which the whole house should be acquired and he gave Rs. 500 as damages for severance besides the price of the land.

The first question that arises in this case is whether an appeal lies. Two sets of cases have been cited by the advocates on both sides. One set of cases cited by Mr. B. Sitarama Rao, advocate for the claimant, shows that appeals under S. 49 have been entertained and considered by the High Court without any objection. The cases cited by the Government Pleader show-

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that some Courts have held that no appeal lies. All these cases were decided before (1) the amendment of Ss. 26 and 54 of the Land Acquisition Act by Act X of 1921, and (2) the decision of the Privy Council, *Ramachandra Rao* v. *Ramachandra Rao*[1], dated 31st January, 1922. Prior to the said amendment and the said decision, the view generally prevailing was that awards under the Land Acquisition Act were not decrees, for it was so decided by the Privy Council in *Rangoon Botatoung Co., Ltd.* v. *The Collector, Rangoon*[2] and secondly apart from an award there could be no decree under the Act so as to make the matter *res judicata* between the parties. Now, the amendment and the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[1] have effected a change in both these matters. In *Ramachandra Rao* v. *Ramachandra Rao*[1] the Privy Council held that if any question other than the amount of compensation was decided under the Land Acquisition Act by the Civil Court after reference, the order of the Civil Court amounts to a decree and an appeal lies and the decision would be *res judicata*. In that case reference to the Civil Court was made under S. 31 (2); but there is nothing in the judgment of their Lordships which shows that the decision turned upon anything peculiar to S. 31. S. 31 (2) refers to the Court to which a reference under S. 18 would be submitted. In S. 49 of the Act the language used is,

"the Collector shall refer the determination of such question to the Court. . . . . In *deciding* on such a reference the Court shall have regard to the question. . . ."

This shows that the conclusion of the Court on a reference under S. 49 is regarded as a decision and if the conclusion on a reference under S. 31 is a decree there is no reason why a decision under S. 49 should not be regarded as a decree. In the present condition of the Act all awards are decrees and all decisions of the Civil Court other than awards on a reference under S. 31 (2) are also decrees. I do not see any reason why decisions on reference under S. 49 should not also be decrees. The earlier decisions therefore are of no value now. The whole scheme of the Act from the point of view of the question whether decisions of Court are decrees and whether appeals lie therefrom has entirely changed. The preliminary objection is therefore overruled and I hold that both the appeals lie.

1. (1922) L. R. 49 I. A. 129: I. L. R. 45 Mad. 320: 43 M. L. J. 78 (P.C.).
2. (1912) L. R. 39 I. A. 197: I. L. R. 40 Cal. 21: 23 M. L. J. 276 (P. C.).

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The next question is whether the claimant has precluded himself from insisting on the whole house being acquired by any delay in making his claim. I have already set forth the circumstances under which he made his claim on 29th September, that is, after the award, and I think there is nothing in his conduct amounting to laches or estoppel. But apart from this, there is nothing in S. 49 requiring the claimant to put forward this particular claim, namely, that the whole house should be acquired, at any particular stage of the proceedings. The learned Government Pleader argued that this sub-clause (2) of S. 49 (1) shows that it should be made before the Collector made his award. But I do not think it shows anything of the kind. It only shows that in a case where it was made before the award the owner may withdraw or modify his desire. I cannot imply from this clause that such claims should be made before the Collector made his award. I do not think that legislation by implication of this kind is justified, and apart from this clause there is no other clause which could be relied on to show that the owner should make this kind of claim before the award is made.

The third question that arises in the case is with reference to the merits. The question is whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house under the last clause of S. 49 (1). Mr. Sitarama Rao, the learned advocate for the claimant, referred to a number of English decisions and also the decision in *Khairati Lal* v. *The Secretary of State for India in Council*[1]. The English Act and the Indian Act (X of 1870) on which these decisions were based did not contain a clause similar to that in S. 49 (1). As was pointed out in the decision in *Venkatatratnam Naidu* v. *The Collector of Godavari*[2] the clause was inserted to meet these decisions. I do not therefore think that these decisions are of any value to us. In the present case a small slice of the backyard is taken away for the road. It cuts off a small fuel shed which is a thatched structure. It also cuts off a portion of a latrine at the north-east corner of the compound. It is true that a latrine is necessary for the enjoyment of a house. If there is no other place within the compound where a latrine can be built for the use of this house, I think the owner

1. (1889) I. L. R. 11 All. 378. 2. (1903) I. L. R. 27 Mad. 350 at 354.

can reasonably insist on the whole house being acquired. I do not think it is proper to point out to him that he should build a latrine beyond the compound by purchasing some other site outside the present compound. But it seems to me that the District Judge is right in holding that there is ample space within the backyard in which a latrine of the former size, namely, 8 ft. 9 inches by 10 ft. 3 inches, can be built without any particular inconvenience to the use of the house. Similarly a fuel shed can be put up. It cannot be successfully argued that a latrine and a fuel shed can be put up only at the places at which they stood at the time of the acquisition. Only then, can it be successfully argued that the land acquired is reasonably necessary for the enjoyment of the house. I therefore agree with the view of the District Judge that this is not a case in which the claimant can insist on the acquisition of the whole house. The result is that Appeal No. 443 should be dismissed with costs.

The District Judge thinks that the amenities of the house have somewhat suffered by taking away a substantial portion of the backyard and for this he gives damages for severance—Rs. 500. We do not see any reason why we should differ from the view of the District Judge. I think therefore that Appeal No. 226 should also be dismissed with costs.

Memorandum of Objections in A. S. No. 227 is not pressed and is dismissed with costs.

Cornish, J.

Cornish, J.—In the Appeals Nos. 217 to 229 I entirely agree with the judgment just delivered, except upon one point, namely, the date for ascertaining market-value for the purpose of compensation.

In my opinion, 1st February, 1921, the date of publication in the *Fort St. George Gazette*, of the Government's notification under S. 12, is the date at which the market-value is to be determined. In the Lower Court it appears to have been thought that, because the Government was empowered by S. 12 to fix a date for the preparation and submission of a draft scheme by the Municipal Council, the date when once fixed was unchangeable. But the date is not fixed by the Act. S. 12 says that the Local Government may require the Municipal Council "before a fixed date" to prepare and submit a scheme. This clearly means that the Government is to fix a date, and a power to fix a date carries with it a power to extend the date ori-

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ginally fixed, unless there is anything in the Act to the contrary. On the other hand, when a Municipal Council proceeds under Ss. 9 and 10 to initiate a scheme, S. 11 fixes the time within which the draft scheme is to be prepared and published, and the power of the Local Government to extend this period is expressly limited by S. 11. But the provision made by S. 12 is "notwithstanding anything contained in Ss. 8 to 11", and this means that the power of the Government to fix a date under S. 12 is free from the limitation imposed by S. 11.

The question is, does the fact of the Local Government altering the date originally fixed for submitting a scheme under S. 12 affect the date of the notification for the purpose of S. 35 (2)? It seems to me that the fixing of a date for the submission of a scheme is subsidiary to the main object of the publication of the notification, which is to give public intimation of the Government's resolve that a town-planning scheme shall be made by the Municipal Council. This also appears to be the main object of the notification under S. 10 (1) when a Municipal Council has in the exercise of its powers under S. 9 resolved to make a town-planning scheme. That is the reason, I think, why S. 35 (2) provides that, "in determining the amount of compensation to be awarded for land required under the Act, the Collector and the Court shall take into consideration (*a*) the market-value of the land at the date of publication of the notification under S. 10 (1) or S. 12, as the case may be." It could not, in my opinion, be successfully contended that, if after publication of a notification under S. 10 (1) the Municipal Council obtained an extension of time from the Local Government under S. 11 (1) for the preparation and publication of the draft scheme, the date for determining the market-value under S. 35 (2) would be correspondingly shifted, (and more than one extension might be granted) for, that would be to make the date for determining the market-value not the date of publication of the notification under S. 10 (1), but the date when time was finally extended under S. 11 (1). And I see no reason why an extension of the time originally fixed by Government under S. 12 should have any different result. In neither case does the Act require the publication of a fresh notification when an extension of time is given, and in the absence of such statutory requirement it appears to me that there is no foundation for the argument that the extended date for the submission

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of the draft scheme must be treated as the date of publication of the notification for the purpose of S. 35 (2) (*a*).

But, as my Lord has pointed out, the question is not of practical importance in this case. The evidence of sales of plots between November, 1919 to May, 1920 and May, 1921—excluding the 6 pies plot which was obviously exceptional and should not be taken into account in striking an average—shows that a rate of a little over 2 annas per sq. foot would be a fair market-value for February, 1921.

With regard to Appeal No. 443 of 1929 I agree that this appeal should be dismissed, not on the two preliminary objections taken by the learned Government Pleader, but on the ground that the District Judge has rightly held that the appellant is not entitled to compel the Municipal Council to acquire the whole of his premises. S. 49 of the Land Acquisition Act cannot, in my opinion, be construed as requiring that an owner must before the award has been made express his desire to have the whole of the house or building acquired; though that would be the normal procedure. No doubt the section provides that an owner may withdraw or modify his expressed desire before the award is made. But that does not imply that an owner who has not made his claim prior to the award can in no circumstances make it afterwards. It has been suggested that the Acquisition Officer's notice under S. 9 of the Land Acquisition Act furnished the proper opportunity to the appellant to make a claim under S. 49. But the particulars required to be put forward under S. 9 are quite different from a claim under S. 49. It is not necessary to decide whether, when a draft scheme is published under S. 14 (1) of the Town Planning Act, the objections and suggestions relating to the scheme which have to be made within the period of sixty days would include a claim of an owner under S. 49 to have the whole of his premises acquired when the scheme proposes to take only a part, or whether, if an owner neglected to put forward this claim within the prescribed period for making objections and suggestions, he would be precluded from doing so thereafter. The question does not arise, because there was no publication of the draft scheme here. It is clear that the appellant is not otherwise estopped by anything he did or failed to do. At the time when the award was made there was no occasion for him to put forward a claim under S. 49. The Municipal Council

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had agreed with him to divert a road, and if this deviation from the scheme had been carried out there would have been no necessity for the taking of any portion of his premises. Unfortunately, the Government refused to concur in this arrangement and only signified their refusal after the award had been made. In this state of facts I do not think that the appellant was debarred from having the question whether the Municipal Council should take the whole of his premises referred to the Court. On the authority of *Venkatareddi* v. *Adhinarayana Rao*[1] which in turn followed the Privy Council's ruling in *Ramachandra Rao* v. *Ramachandra Rao*[2] the decision of the Court upon this reference under S. 49 must be held to be a decree and therefore appealable. But I think that the appeal fails on the merits. The appellant can only insist on the whole of his house being acquired if the parts proposed to be taken "form part of the house". This is entirely a question of fact which the Court in deciding is required by S. 49 to "have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house". Looking at the plan of the appellant's premises it appears to me that there are good reasons for the District Judge holding that the portion taken under the scheme is not reasonably required for the full and unimpaired use of the appellant's house, and consequently the appellant cannot compel the Municipal Council to acquire the whole.

K. C. *Appeals dismissed.*

[END OF VOLUME LXIII]

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